THE JURISPRUDENCE

OF THE

PRIVY COUNCIL

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CONTAINING

A DIGEST OF ALL THE DECISIONS OF THE PRIVY COUNCIL
SINCE THE PUBLICATION OF THE FIRST VOLUME IN 1891;
THE AMENDMENTS TO THE CONSTITUTION OF
THE JUDICIAL COMMITTEE, AND THE
NEW RULES OF PRACTICE

AND ALSO

TWO APPENDICES

BY

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* *The stars indicates the members usually attending the sitting of the Judicial Committee.*

PREFACE

Seventeen years have elapsed since the publication of my first volume of *The Jurisprudence of the Privy Council.*

This work was then received with favour. Amongst the Law publications which have praised it, I may quote "The Solicitor's Journal and Reporter" of London, England, which said:

"It is, in fact, a digest of the decisions of the Privy Council, prefaced by a sketch of its history, a statement of the constitution and jurisdiction of the tribunal, and a summary of the procedure before it. The value of the digest may be estimated from the heading "Appeal," in which, under thirty-two heads, the rules laid down in successive cases are arranged and shortly stated, with occasional extracts from judgments laying down the principles. The work seems to be invaluable to practitioners in the Supreme Colonial Court of Appeal, and on several points, such as the right to extension of patents, will be of use to the general practitioner."

And "The Western Law Times":—"The author of this most excellent work has conferred a real boon upon the profession by giving them, in this handsome volume of 934 pages, the result of the decisions of the first tribunal of the world. We hope that the bar will, by its hearty support, enable Mr. Beauchamp, in some measure, to reap the fruits of his labours. Such a work has long been needed and expected, and, after a critical examination, it appears to us to fill every requirement. It is called a digest, but it is really more than that in many instances, as the judgments of the Court are not seldom given in extenso. The arrangement of the subject and classification throughout, we have found to answer every test we have subjected them to. Nothing more can be said in praise of a digest and book of reference such as this is. The notes on the constitution of the Privy Council are good, and the sum-

mary of procedure, with useful instructions, tariffs of fees, and forms, is eminently practical.

"Appendix A treats of the British Colonies and of the nature of their civil law, and condenses a great deal of information in tabular form.

"The book is handsomely got up, good paper and clear type; the binding is specially neat and tasteful. In conclusion, we can only say that this work should, and doubtless will, at once, take the high place in the legal library that it is justly entitled to."

This second volume contains the judgments of the Judicial Committee of the Privy Council since 1891, and also all the amendments to its constitution and to its procedure.

As in all the courts of justice in England, the Judicial Committee has no rules of law except those which are enacted by Statute or established by Rules of Practice. No codification exists of the civil law or of the law of procedure. Common law, the text of Statutes, precedents of courts, judicial remarks of judges form its sources of law; and rules, precedents and old usages establish its practice. For this reason some very old rules are still in existence in the Judicial Committee, though they have a tendency to disappear.

We have an example in the ancient custom which made it obligatory for an appellant, before proceeding *ex parte* in an appeal, to obtain two successive "Appearance Orders" for the Respondent to appear, and to publish the same by affixing them on the *Royal Exchange and elsewhere*. This inconvenient notice has been lately dispensed with, and now notice must be served on the Respondent.

The reason for this attachment to customs and usage is that England is the most conservative country of every thing respecting ancient law, old methods of procedure and judicial decisions, especially those of the High Court, House of Lords and Privy Council. Efforts have been made to abate this great influence of custom and jurisprudence and to bring into effect the authority of positive text, but with little success. *Rey*, in his "*Judicial Institutions of England*," (*Vol.* 2, *p.* 211), on the occasion of a statute passed to prevent certain abuses of civil procedure, says: "It is to be seen if this Act shall not

"be illusory, as so many other similar, which the judges and "the professional practitioners have infringed with impunity."

The rules of English courts of equity have always been based on natural law, that is, the law which offers itself most naturally to one's mind and is more apt to serve the object in view, without admitting conventional rules. With this system, the courts were called upon to apply their own form of administering justice.

This natural procedure is now admitted, in France, in the tribunals of inferior jurisdiction, such as that of *Prud-homme*, of *Commerce* and of the *Justice of Peace*. Technical procedure is followed by the other courts of justice, but without uniformity.

The Privy Council has always made its own rules, which are becoming very simple.

I have, in this second volume, followed the same method as in the first. The order is alphabetical, all the decisions applicable to this country are given, with the remarks of their Lordships in which reference is made to the principles of law governing the cases reported.

The jurisprudence of this High Tribunal is of absolute authority in this country, not only on account of the fact that it is our final court of appeal, but also because of the respect Canadians have for the great learning and probity of its members.

This well known sentiment clearly reflected in the members of the Bar has induced me to present them this additional volume, hoping that it will be useful to them and will merit their approval and support.

J. J. BEAUCHAMP.

Montreal, 1st March, 1909.

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EXPLANATION OF THE ABBREVIATIONS

Abbreviations.	Reporters and Reports.	Courts.
A. & E	Adolphus & Ellis	Queen's Bench.
App. Cas.	Appeal Cases	
Atk.	Atkyn's Reports.	Chancery.
B. or Bar. & Ald. or A.	Barnewall & Alderson	King's Bench.
Bar. & Ad.	Barnewall & Adolphus.	" "
B. & Barn. & C. or Cr.	Barnewall & Cresswell.	" "
Bea. or Beav.	Beaven	Rolls
Bell's Cr.	Bell's Criminal Cases	Criminal Appeals.
Bing	Bingham.	Common Pleas.
Bing. N. C.	Bingham, new cases.	" "
B. or Bos. & Pul. or P.	Bosanquet & Puller.	" "
B. or Br. & L.	Browning & Lushington.	Admiralty
Bro. P. C	Brown's Parliament Cases	House of Lords.
Brod. & Bing.	Broderip & Bingham	Common Pleas.
B. & S	Best & Smith	Queen's Bench.
Camp.	Campbell.	*Nisi prius.*
C. B	Common Bench Reports, old series	Common Pleas.
C. B. N. S.	" " " new "	" "
C. C	Consular Court.	
C. C. P. Q	Code Civil.	Province of Quebec.
C. C. P. P. Q	Code of Civil Procedure	" "
Ch. App	Chancery Appeals.	Chancery.
Ch. D	Chancery Division.	"
C. or Car. & K	Carrington & Kirman.	*Nisi prius.*
C. or Cl. & F. or Fin.	Clark & Finnelly	House of Lords.
C. & P	Carrington & Payne.	*Nisi prius.*
C. S. U. C.	Consolidated Statutes, Upper Canada	
Cox C. C	Cox's Criminal Cases.	Criminal Appeals.
Cr. & P. or Ph.	Craig & Philip	Chancery.
Curt. Ecc. Rep	Curtis Ecclesiastical Reports	Ecclesiastical.
D. or Dears. & B. C. C.	Dearsley & Bell's Crown Cases	Criminal Appeals.
Deac	Deacon.	Bankruptcy.
Dears. or Dearsl. C. C.	Dearsley's Crown Cases	Criminal Appeals.
De G. J. & S.	De Gex, Jones & Smith	" "
Den. C. C.	Denison	Exchequer & Criminal.
D. & M.	Davison & Merivale	Queen's Bench.
D. or De G. F. & J	De Gex, Fisher & Jones	Lord Chanc. & Appeal.
Dod.	Dodson, Admiralty Cases	Admiralty.
Drew.	Drewry	Kindersley V. C.
D. or Dr. & War.	Drury & Warren.	Chancery, Ireland.
East.	East	King's Bench.
E. or El. B. or Bl	Ellis & Blackburn.	Queen's Bench.
Edw. A. R	Edward's Admiralty Reports	Admiralty.
E. or El. & E. or E. I.	Ellis & Ellis	Queen's Bench.
E. or Eng. & Ir. App.	English and Irish Appeals.	House of Lords.
Ex. Rep	Exchequer Reports	Exchequer.
Exch. (W., H. & Gord.	Exchequer Reports by Welsby, Hurlstone & Gordon.	"

H[redacted] Adm.	Haggard's Admiralty Reports	Admiralty.
Hagg. Ecc. Rep.	Haggard's Ecclesiastical Reports.	Ecclesiastical.
Hare	Hare	Vice-Chancellor
H. & C.	Hurlstone & Coltman	Exchequer
H. L.	House of Lords.	
H. L. C.	House of Lords Cases (Clark)	House of Lords.
H. or Hem. & M. or Mil.	Hemming & Miller	Chancery.
H. & N.	Hurlstone & Norman	Exchequer.
How. R. U. S.	Howard's Reports, United States	Supreme Court.
Ins.	Institutes	
Ir. L. Rep. (Eq.)	Ireland Law & Equity Reports	Common Pleas
J. or Jac. & W. or Wal.	Jacob & Walker	Chancery.
Jurist	Jurist	General
J. or Jebb & S.	Jebb & Symes Reports.	King's Bench, Ireland.
K. or Kay & J.	Kay & Johnson's Reports	Chancery.
Knapp.	Knapp's Privy Council Reports	Privy Council.
L. C. J.	Lower Canada Jurist	General.
L. C. L. J.	Lower Canada Law Journal.	"
L. C. R.	Lower Canada Reports.	"
Leon.	Leonard's Reports	King's Bench.
L. J. Ex.	Law Journal	Exchequer.
L. J. P. C.	Law Journal Privy Council	Judicial Committee.
L. N.	Legal News (Canada).	General.
L. R. App. Cas.	Law Reports, Appeal Cases	House of Lords Privy Council
L. R. H. L.	" " " "	
L. R. P. C.	" " " "	House of Lords.
L. R. S. C.	" "	Privy Council
L. R. Q. B.	" "	Superior Court.
L. T. N. S.	Law Times, new series.	Queen's Bench.
		General.
M. or Mau. & S. or Sel.	Maule & Selwyn	King's Bench.
M. or Mont. D. & D. or De G.	Montague, Deacon & De Gex's Rep.	Bankruptcy.
Macq. Sc. Ap. Cas.	Macqueen's Scotch Appeals Cases.	House of Lords
Mer. or Meriv.	Merivale's Reports	Chancery.
M. L. R.	Montreal Law Reports	General.
Moore.	Moore's Privy Council Reports.	Judicial Committee.
Moore Ind. App.	Moore's Indian Appeal Cases	" "
M. or Mee & W. or Wels.	Meeson & Welsley	Exchequer.
Myl. & C.	Mylne & Craig	Chancery.
My. & K.	Mylne & Keen	"
Noy.	Noy's Reports	King's Bench.
N. S.	New Series	
O. C.	Order in Council.	
P. D.	Perry & Davison.	Queen's Bench.
Ph. or Phil.	Philip	Chancery.
P. Wm.	Peere Williams.	"
Q. B.	Adolphus & Ellis Reports, new series	Queen's Bench
Q. L. R.	Quebec Law Reports	General.
Reg.	Regina	
R. L.	Revue Legale (Quebec).	"
Rob.	Robinson	House of Lords.
Robert App.	Robertson's Appeals.	"
Russ.	Russell	Chancery.
Russ. & M. or Myl.	Russell & Mylne's Reports.	"
R. or Ry. & M. or Mood.	Ryan & Moody	*Nisi prius.*
Salk.	Salkeld's Reports.	King's Bench.

S. C. R	Supreme Court Report (Canada)	Supreme Court.
S. C.	Supreme Court	
Sim.	Simon	Vice-Chancellor.
Sup. C.	Superior Court	
Sw. & Tr	Swabey & Tristram's Reports	Probate & Divorce.
Swa	Swanston	Chancery.
Swab	Swabey Reports	Admiralty.
Taunt	Taunton	Common Pleas.
T. or Term R. or Rep.	Terms Reports (Durnsford & East)	King's Bench.
U. C. R	Upper Canada Reports	General.
V	Versus	
V. A	Vice-Admiralty	
Ves	Vesey	Chancery.
Ves. jr.	Vesey, junior	"
W. B. L. or W. Bl.	Sir William Blackstone	Common Pleas & Q. B.
Wheaton	Wheaton's American Reports	
Wm. Rob	William Robinson's New Admiralty Reports.	

NOTES

ON THE

CONSTITUTION OF THE JUDICIAL COMMITTEE

The "Appellate Jurisdiction Act, 1887," 50 and 51 Vict. c. 70, s.s 3 and 4, the last-mentioned English statute referred to in my first volume, enacted that the Judicial Committee as formed under the provisions of the first section of the Act of the 3rd and 4th William IV. chapter 4., intituled "An Act for the better administration of Justice in His Majesty's Privy Council," shall include such members of Her Majesty's Privy Council as are for the time being holding or have held any of the offices in the Appellate Jurisdiction Act, 1876, and this Act, described as high judicial offices, including the office of a Lord of Appeal in Ordinary, and the office of a member of the Judicial Committee, which are considered as high judicial offices. The remuneration of the member, not being Lord in Ordinary, to be £800 for every year during which he shall attend the sitting of the Committee.

The constitution of the Judicial Committee has been since modified by Imperial Statutes.

Admiralty Appeals.

In 1890, by 53 and 54 Vict. ch. 27, the Colonial Courts of Admiralty Act, has enacted:—

Section 6—"(1) The appeal from a judgment of any court "in a British possession in the exercise of the jurisdiction "conferred by this Act, either where there is as of right no

"local appeal, or after a decision on local appeal, lies to "Her Majesty the Queen in Council.

"(2) Save as may be otherwise specially allowed in a "particular case by Her Majesty the Queen in Council, an "appeal under this section shall not be allowed.

"(a) from any judgment not having the effect of a definite "judgment unless the court appealed from has given leave "for such appeal, nor

"(b) from any judgment unless the petition of appeal has "been lodged within the time prescribed by rules, or if no "time is prescribed within six months from the date of "the judgment appealed against, or if leave to appeal has been "given then under the date of such leave.

"(3) For the purpose of appeals under this Act, Her "Majesty the Queen in Council and the Judicial Committee of "the Privy Council shall, subject to rules under this section, "have all powers for making and enforcing judgments, whether "interlocutory or final, for punishing contempts, for requiring "the payment of money into Court, or for other purpose, as "may be necessary, or as were possessed by the High Court of "Delegates before the passing of the Act transferring the "powers of such court to Her Majesty in Council, or as are for "the time being possessed by the High Court in England or by "court appealed from in relation to the like matters as those "forming the subject of appeals under this Act.

"(4) All orders of the Queen in Council or the Judicial "Committee of the Privy Council for the purposes aforesaid or "otherwise in relation to appeals under this Act shall have full "effect throughout Her Majesty's dominions, and in all places "where Her Majesty has jurisdiction.

"(5) This section shall be in addition to and not in dero-"gation of the authority of Her Majesty in Council or the "Judicial Committee of the Privy Council arising otherwise "than under this Act, and all enactments relating to appeals to "Her Majesty in Council or to the powers of Her Majesty in "Council or the Judicial Committee of the Privy Council in "relation to those appeals, whether for making rules and "orders or otherwise, shall extend, save as otherwise directed "by Her Majesty in Council, to appeals to Her Majesty in "Council under this Act."

Appeals in Prize Cases.

In 1891 the "Judicature Act," 54-55 Vict., ch. 53, section 4. (3), provided that:—Any appeal from the High Court, when acting as a Prize Court, shall be only to Her Majesty in Council, in accordance with the Naval Prize Act, 1884."

Additional Judges.

In 1895, the "Judicial Committee Amendment Act" 58 and 59 Vict. ch. 44, was passed as follows:—

"Be it enacted by the Queen's most excellent Majesty, by "and with the advice of the Lords Spiritual and Temporal, "and Commons, in this present Parliament assembled and by "the authority of the same, as follows:—

"(1) If any person being or having been Chief Justice or a "Judge of the Supreme Court of the Dominion of Canada or "of a Superior Court in any province of Canada, of any of the "Australasian colonies mentioned in the schedule to this Act, "or of either of the South African colonies mentioned in the "said schedule, or of any other superior court in Her Majesty's "dominions, named in that behalf by Her Majesty in Council, "is a member of the Judicial Committee of the Privy Council.

"(2) The number of persons being members of the Judicial "Committee by reason of this Act shall not exceed five at any "one time.

"(3) The provisions of this Act shall be in addition to, and "shall not affect, any other enactment for the appointment of "or relating to members of the Judicial Committee."

NEW RULES OF PRACTICE AND AMENDMENTS MADE SINCE 1891.

COUNSEL AND SOLICITORS.

6th day of March, 1896.

1. Every proctor, solicitor, or agent admitted to practise before Her Majesty's Most Honourable Privy Council, or any of the Committees thereof, shall subscribe a declaration to be enrolled in the Privy Council Office, engaging to observe and obey the Rules, Regulations, Orders, and Practice of the Privy

Council; and also to pay and discharge, from time to time, when the same shall be demanded, all fees or charges due and payable upon any matter pending before Her Majesty in Council; and no person shall be admitted to practise, or allowed to continue to practise, before the Privy Council, without having subscribed such declaration in the following terms:—

Form of Declaration.

"We, the undersigned, do hereby declare, that we desire and "intend to practise as solicitors or agents in appeals and other "matters pending before Her Majesty in Council; and we "severally and respectively do hereby engage to observe, submit "to, perform, and abide by all and every the orders, rules, "regulations, and practice of Her Majesty's Most Honourable "Privy Council and the Committees thereof now in force, or "hereafter from time to time to be made; and also to pay and "discharge, from time to time, when the same shall be "demanded, all fees, charges, and sums of money due and "payable in respect of any appeal, petition, or other matter in "and upon which we shall severally and respectively appear as "such solicitors or agents."

II. Every [proctor or solicitor practising in London] shall be allowed to subscribe the foregoing declaration, and to practise in the Privy Council, upon the production of his certificate for the current year; and no fee shall be payable by him on the enrolment of his signature to the foregoing declaration.

III. Persons not being certificated London solicitors, but having been duly admitted to practise as solicitors by the High Courts of Judicature [in England and Ireland, or by the Court of Session in Scotland, or by the High Courts in any of Her Majesty's dominions respectively] may apply, by petition, to the Lords of the Committee of the Privy Council for leave to be admitted to practise [before such Committee] and such persons [may, if the Lords of the Committee please, be admitted to practise by an order of their Lordships, for such periods and under such conditions as their Lordships are pleased to direct.]

IV. Any proctor, solicitor, agent, or other person practising before the Privy Council, who shall wilfully act in violation of the rules and practice of the Privy Council, or of any rules

prescribed by the authority of Her Majesty, or of the Lords of the Council, or who shall misconduct himself in prosecuting proceedings before the Privy Council, or any committee thereof, or who shall refuse or omit to pay the Council office fees or charges payable from him when demanded, shall be liable to an absolute or temporary prohibition to practise before the Privy Council, by the authority of the Lords of the Judicial Committee of the Privy Council, upon causes shown at their Lordships' bar.[1]

EXTENSION OF PATENT.

Rules of practice made in proceedings before the Judicial Committee to be observed in applications for extensions of Patent, under the "Patents, Design, and Trade Marks' Act, 1883."

27th day of November, 1897.

I. A party intending to apply by petition under section 25 of the Act shall give public notice by advertising three times in the "London Gazette," and once at least in each of three London newspapers.

If the applicant's principal place of business is situated in the United Kingdom, at a distance of fifteen miles or more from Charing Cross, he shall also advertise once at least in some local newspaper published or circulating in the town or district where such place of business is situated. If the applicant has no place of business, then, if he carries on the manufacture of anything made under his specification at a distance of fifteen miles or more from Charing Cross, he shall advertise once at least in some local newspaper published or circulating in the town or district where he carries on such manufacture. If he has no place of business and carries on no such manufacture, then, if he resides at a distance of fifty miles or more from Charing Cross, he shall advertise once at least in some local newspaper published or circulating in the town or district where he resides.

The applicant shall in his advertisements state the object of his petition and shall give notice of the day on which he intends

1 I have placed between brackets the amendments made to the Rules of 1870.

to apply for a time to be fixed for hearing the matter thereof, which day shall not be less than four weeks from the date of the publication of the last of the advertisements to be inserted in the "London Gazette." He shall also give notice that caveats must be entered at the Council Office on or before such day so named in the said advertisements.

II. A petition under section 25 of the Act must be presented within one week from the publication of the last of the advertisements required to be published in the "London Gazette."

The petition must be accompanied with an affidavit or affidavits of advertisements having been published according to the requirements of the first of these rules. The statements contained in such affidavit or affidavits may be disputed upon the hearing.

The petitioner shall apply to the Lords of the Committee to fix a time for hearing the petition, and when such time is fixed the petitioner shall forthwith give public notice of the same by advertising once at least in the "London Gazette" and in two London newspapers.

III. A party presenting a petition under section 25 of the Act must lodge at the Council Office eight printed copies of the specification; but if the specification has not been printed and if the expense of making eight copies of any drawing therein contained or referred to would be considerable the lodging of two copies only shall be deemed sufficient.

The petitioner shall lodge at the Council Office eight copies of the balance sheet of expenditure and receipts relating to the patent in question which accounts are to be proved on oath before the Lords of the Committee at the hearing. He shall also furnish three copies of the said balance sheet for the use of the Solicitor to the Treasury, and shall upon receiving two days notice, give the Solicitor to the Treasury, or any person deputed by him for the purpose, reasonable facilities for inspecting and taking extracts from the books of account by reference to which he proposes to verify the said balance sheet at the hearing or from which the materials for making up the said balance sheet have been derived.

All copies mentioned in this rule must be lodged and furnished not less than fourteen days before the day fixed for the hearing.

IV. A party to oppose a petition under sect. 25 of the Act must enter a caveat at the Council Office before the day on which the petitioner applies for a time to be fixed for hearing the matter thereof and having entered such caveat shall be entitled to have from the petitioner four weeks' notice of the time appointed for the hearing.

The petitioner shall serve copies of his petition on all parties entering caveats in accordance with this rule and no application to fix a time for hearing shall be made without affidavit of such service.

All parties intending to oppose a petition shall within three weeks after such copies are served on them respectively lodge at the Council Office eight printed copies of the grounds of their objections to the granting of the petition.

V. Parties shall be entitled to have copies of all papers lodged in respect of any petition under sect. 25 of the Act at their own expense.

All such petitions and all statements of grounds of objection to such be printed in the form prescribed by the rules which apply to proceedings before the Judicial Committee of the Privy Council. Balance sheets of expenditure and receipts shall be printed in a form convenient for binding along with such petitions.

VI. Costs incurred in the matter of any petition under sect. 25 of the Act shall be taxed by the Registrar of the Privy Council, or other officer deputed by the Lords of the Judicial Committee of the Privy Council to tax the costs in the matter of any petition, and the registrar of such other officer shall have authority to allow or disallow in his discretion all payments made to persons of science or skill examined as witnesses.

VII. The Lords of the Committee may excuse petitioners and opponents from compliance with any of the requirements of these rules, and may give such directions in matters of procedure and practice under sect. 25 of the Act as they shall consider to be just and expedient.

VIII. The Lords of the Committee will hear the Attorney-General or other counsel on behalf of the Crown on the question of granting the prayer of any petition under sect. 25 of the Act. The Attorney-General is not required to give notice of the grounds of any objection he may think to take or of any

evidence which he may think fit to place before the Lords of the Committee.

APPEARANCES.

Whereas there was this day read at the Board a representation from the Judicial Committee of the Privy Council, dated the 16th day of March, 1905, and in the words following, viz.:—

"The Lords of the Judicial Committee having taken into "consideration the practice under which an Appeal to Your "Majesty in Council cannot in the absence of a special Order "in that behalf made by their Lordships be set down for hear-"ing *ex parte* as against a Respondent to the Appeal who has "filed to enter an Appearance thereto in the Registry of the "Privy Council unless the Appellant shall have previously "obtained from their Lordships two successive Orders "commonly known as 'Appearance Orders' requiring the said "Respondent to enter an Appearance to the Appeal within the "periods by the said Orders respectively limited and shall have "duly published the said Orders by affixing the same on the "Royal Exchange and elsewhere in the usual manner and "unless the said periods so limited by the said Orders as afore-"said shall have expired. And being of opinion that the said "practice is inconvenient and ought in certain cases and subject "to certain conditions to be dispensed with. Their Lordships "do this day agree humbly to recommend to Your Majesty to "order as follows, that is to say:—

"1. That where a Respondent to an Appeal to Your Majesty "in Council whose name has been entered on the Record of the "Appeal by the Court admitting the Appeal fails to enter an "Appearance to the Appeal in the Registry of the Privy "Council and it appears from the Transcript Record in the "Appeal or from a Certificate of the Officer of the Court trans-"mitting the said Transcript Record to the Registrar of the "Privy Council that the said Respondent has received notice "of the Order admitting the Appeal to Your Majesty in "Council or of the Order of Your Majesty in Council giving "the Appellant special leave to appeal to Your Majesty in "Council (as the case may be) and has also received notice of "the dispatch of the said Transcript Record to the Registrar of

"the Privy Council the Appellant shall not subject to any "direction by their Lordships to the contrary be required to "take out Appearance Orders calling upon the said Respondent "to enter an Appearance in the Appeal and the Appeal may "subject as aforesaid be set down for hearing *ex parte* as "against the said Respondent at any time after the expiration "of three calendar months from the date of the lodging of the "Appellant's Petition of Appeal in like manner as if the said "Appearance Orders had been taken out by the Appellant and "the times thereby respectively limited for the said Respondent "to enter an Appearance had expired.

"2. That where a Respondent to an Appeal to Your Majesty "in Council whose name has been brought on the Record of the "Appeal by an Order of Your Majesty in Council fails to "enter an Appearance to the Appeal in the Registry of the "Privy Council and it appears from the Transcript Record or "from a Supplementary Record in the Appeal or from a "Certificate of the Officer of the Court transmitting the said "said Transcript Record or Supplementary Record to the "Registrar of the Privy Council that the said Respondent has "received due notice of any intended application to Your "Majesty in Council to bring him on the Record as a "Respondent to the Appeal the Appellant shall not subject to "any direction by their Lordships to the contrary be required "to take out Appearance Orders calling upon the said "Respondent to enter an Appearance in the Appeal, and the "Appeal may subject as aforesaid be set down for hearing *ex* "*parte* as against the said Respondent at any time after the "expiration of three calendar months from the date on which "the said Respondent shall have been served with a copy of "Your Majesty's Order in Council bringing him on the Record "of the Appeal in like manner as if the said Appearance "Orders had been taken out by the Appellant and the times "thereby respectively limited for the said Respondent to enter "an Appearance had expired.

"3. That nothing herein contained shall be deemed to affect "the power of their Lordships to order the Appellant in an Ap-"peal referred to Your Majesty to their Lordships to take out "Appearance Orders or to be excused from taking out Appear-"ance Orders in any case in which their Lordships shall think

"fit so to order and generally to give such directions as to the "time at which and the conditions on which an Appeal so "referred as aforesaid shall be set down as in the opinion of "their Lordships the circumstances of the case may require.

"4. That this Order shall apply to all Appeals in which the "Petition of Appeal shall be lodged after the date hereof."

His Majesty having taken the said representation into consideration, was pleased, by and with the advice of His Privy Council, to approve thereof, and of what is therein recommended. Whereof all persons whom it may concern are to take notice, and govern themselves accordingly.

A. W. FITZROY.

CORRESPONDENCE WITH THE PRIVY COUNCIL OFFICE.

The following letters sent to and received from the Registrar of the Privy Council in London, England, might be useful to the legal profession. For this reason I have obtained the permission to publish them.

Costs Incurred in Canada in Appeals to the Privy Council.

Montreal, March 4th, 1890.

To the Registrar of the Privy Council,
London, England.

Dear Sir:—

In re McDougall v. McGreevey

A question has been raised on taxing the bill of costs of the appellant before me in this case, upon which I would be much obliged if you could give me some official information.

The appellant had the record printed in Canada. He was successful in his appeal and his bill of costs was taxed in England, as is usually done. He afterwards presented a bill of costs which was taxed by me, which included the costs incurred for the printing of the record and other proceedings had in Canada.

The respondent opposed the taxation on the ground that the

costs had been finally taxed by the Registrar of the Privy Council, and no other costs could be taxed by me.

Could you kindly give me the following information?

1. Could the Registrar of the Privy Council tax costs incurred on proceedings had in Canada, such as those in question in the present case, and particularly the printing of the record; and is it the practice of your court to include those costs in the taxed bill?

2. Can you deliver a certificate to the effect that in the present case of *McDougall* v. *McGreevy*, the cost of printing the record has not been included in the bill taxed by you against the respondent?

And if you can, please, send me such a certificate.

I have the honour to be, sir, your very obedient servant,

L. W. MARCHAND,
Clerk of Appeal.

Whitehall, London,
SIR, 20th March, 1890.

In answer to your letter of the 6th March instant, I have the honour to inform you that on the taxation of bills of costs arising out of appeals from India and the Colonies, the only costs which are dealt with by the Registrar of the Privy Council, and the only costs which are inserted in Her Majesty's Order in Council are the costs incurred in England.

In the appeal of *McDougall v. McGreevy*, to which your letter alludes, the main record was printed in Canada, and a supplement record of five pages containing the reasons of Honorable Mr. Justice Cross was printed in England. Of the former, I, for the reasons above stated, took no cognizance, while for these reasons, I did take cognizance of the latter, and dealt with it on the taxation.

I trust that the above statement may serve the purpose for which you may require it, as well as a formal certificate would do, which it is not usual to give in such a case.

I have the honour to be, sir, your obedient servant,

C. P. FABER, Reg. C. P.

The Clerk of Appeals, Court of Queen's Bench, Montreal.

Amount of Security to be furnished by the Appellant in Appeals to the Privy Council.

Appeal Office, Montreal,
14th December, 1892.

To the Registrar of Her Majesty's
Privy Council, Whitehall, England.

SIR,

It has been the uniform practice of this court, for a great number of years, to exact from the party appealing to Her Majesty in Her Privy Council, a security of the amount of $2,000.00 for costs; an amount, which, I am informed is higher than that required by the Privy Council itself.

It has also been remarked that it seldom happens that the costs taxed in the Privy Council, and included in the Decree of final judgment of Her Majesty in Canadian laws, exceeds the sum of £300 st.

For these reasons, I am directed by Sir A. Lacoste, Chief Justice of the Court of Queen's Bench, to enquire from you, which I do respectfully, whether our information about the usual amount of security required for costs in the Bail Bonds taken before you is correct, and whether a Bail Bond for £300 st. would, in the majority of cases, cover the costs taxed.

I have the honour to be, sir, your very obedient servant,

L. W. MARCHAND.

London, 8th February, 1893.

SIR,

In reply to the questions contained in your letter of the 14th December last, which I regret to have been unable to answer sooner, I have the honour to acquaint you, for the information of the Chief Justice:—

1. That when leave to appeal is granted by the Lords of the Privy Council, the amount of the deposit required from the party appellant as security of costs is usually £300. It is not the custom of this department to accept a Bail Bond. The sum in question is required to be lodged in the Privy Council

Office to abide the directions of the Board on the conclusions of the appeal.

2. That the costs incurred in England in defending an appeal before the Privy Council depend most upon the bulk of the record, and upon the nature of the questions to be decided.

This sum of £300 is, in the majority of cases, found to be sufficient to meet the taxed costs of the party respondent. rough cases are not infrequent when that amount is exceeded.

I am, sir, your obedient servant,

J. D. FABER,
Registrar of the Privy Council.

Printing of Records.

Sir Alexander Lacoste, Chief Justice
of the Court of King's Bench.

Downing Street, London, S.W.,
5th January, 1907.

SIR,

I am desired to remind you that, with a view to saving time and expense, their Lordships of the Judicial Committee are prepared to accept the records as printed for the Canadian courts, with the necessary additions bringing the case up to date, as the records in appeals in the Privy Council, if the former courts adopt the form of printing now prescribed for Privy Council records.

Their Lordships will feel obliged if you will make the purport of this letter as widely known as practicable.

I am, sir, your obedient servant,

E. S. HOPE,
Registrar of the Privy Council.

The Clerk of Appeals, Court of King's
Bench, for the Province of Quebec.

DIGEST

OF THE

JURISPRUDENCE of the PRIVY COUNCIL

SINCE 1891.

A

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ACQUIESCENCE

IN ARTICLES OF ASSOCIATION.

Ho Tung v. Man on Insurance Company [1]

1. Articles of association of a joint stock company which have been irregularly registered, and never formally adopted by special resolution, may become the articles of the company by the acquiescence and agreement of the shareholders as shown by a long course of dealing.

Lord Davey, p. 619: — It was, no doubt, imperative on the registrar to require the articles to be signed before registering them as it was to see that they complied with the other requisitions of the Ordinance, as, for example, that they were printed and expressed in paragraphs numbered arithmetically. But there is no reason why the shareholders should not adopt them although irregularly registered. The statutory mode of doing so is by special resolution; but this, again, is only machinery for securing the assent of the shareholders or a sufficient majority of them. In *Phosphate of Lime Company* v. *Green*,[2] it was held that the company was bound by the acquiescence of the shareholders in an act done by the directors in direct violation of the articles of association, although there had been no alteration of the articles by a special resolution. In commenting on the case arising out of the *Agriculturalist Cattle Insurance Company, Sparkman* v. *Evans*[3]; *Evans* v. *Smallcombe*[4]; *Houldsworth* v. *Evans*[5]: *Lord Cairns, L.C., in Ashbury Railway Carriage Company* v. *Riche*,[6] says: "If they had sanctioned what had been done without the formality of a resolution, it was quite clear that that would have been perfectly sufficient." He adds: "So also in the case of the *Phosphate of Lime Company* the question was whether that had been done by the sanction of the company which clearly might have been done by a resolution passed by the company. Their Lordships think that by the acquiescence and agreement of the shareholders, shown by a long course of dealing, the registered articles have become the articles of association of the company as surely as if they had been formally adopted by special resolution.

See Contract: *Eod. vo.* Storage: *Acquiescence in default of storehouse.*

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1 Hong Kong, aff., 30th November, 1901, 85 L. T. R., 617.
2 25 L. T. Rep. 636; L. Rep. 7 P. C. 43.
3 19 L. T. Rep. 151; L. Rep. 3 H. L. 171.
4 do. 207 and 249.
5 do. 211 and 263.
6 33 L. T. Rep. 450; L. Rep., 7 H. L. 653.

ADJACENT

MEANING OF THIS WORD.

WELLINGTON CITY v. LOWER HUTT BOROUGH[1]

1. The word "adjacent" is not one to which a precise and uniform meaning is usually attached. It is not confined to places adjoining, and it includes places close to or near, its application being entirely a question of circumstances.

ADMIRALTY

See APPEAL: *Colonial courts of admiralty.*

AFFREIGHTMENT

CHARTER PARTY.

OWNERS OF THE STEAMSHIP "LANGFORD" v. CANADIAN FORWARDING & EXPORT COMPANY.[2]

1. A charter party contained a clause providing: "Payment of the said hire to be made in cash monthly in advance, . . . and in default of such payment or payments as herein specified, the owners shall have the faculty of withdrawing the said steamer from the service of the charterers."

2. A month's hire become due on the 11th September. On the 1st October it was still unpaid, and the owners gave notice that they withdrew the ship, which was at the time at sea.

3. On the 2nd October, the month's hire was paid, and on the same day the ship arrived in port.

4. On the 4th October, the master, under instructions from the owners, withdrew the ship.

5. Held that there was a breach of the charter-party for which the owners were liable in damages.

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1 New Zealand, aff., 26th July, 1904, 73 L. J. R., n.s., 8C.
2 Quebec, 1907, aff., 96 L. T. R., 559.

DEMURRAGE.

THE STEAMSHIP CITY OF PEKIN v. COMPAGNIE DE MÉNAGERIES MARITIMES "THE CITY OF PEKIN."[1]

6. To entitle a shipowner to recover demurrage, he must show actual loss resulting from the detention of his ship and give reasonable proof of its amount.

7. Where successful plaintiffs in a collision action claimed demurrage during the time their vessel was under repairs, and it appeared that the plaintiffs substituted another of their ships to do the work of the damaged ship, the expenses and loss incidental to this substitution being allowed against the defendants, and the plaintiffs failed to show that they had sustained any pecuniary loss by the detention of their ship, it was held that they were not entitled to recover demurrage; but that if they could show an actual out-of-pocket expense, usually included in the term demurrage, such as wages and maintenance of crew, they would be entitled to recover such sums.

SIR BARNES PEACOCK, page 724:—There is no doubt as to the rule of law according to which compensation is to be assessed in cases of this nature where a partial loss is sustained in collision. the rule is *restitutio in integrum*: *The Black Prince*.[2] The party injured is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered. It does not follow, as a matter of necessity, that anything is due for detention of a vessel whilst under repair. In order to entitle a party to be indemnified for what is termed in the Admiralty Court a consequential loss resulting from the detention of his vessel, two things are absolutely necessary, actual loss and reasonable proof of the amount; *The Clarence*.[3] *The Argentine*.[4]

EXCEPTIONS IN CHARTER-PARTY.

WAVERTREE RAILWAY SHIP COMPANY v. LOVE.[5]

8. Exceptions in a charter party will not free a shipowner from liability for the consequences of personal negligence in loading the ship whereby she is rendered unseaworthy.

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1 Hong Kong, varied, 14th December, 1890, 63 L. T. R., n.s., 722
2 Lush Rep., 573
3 3 Wm Rob Rep., 283.
4 61 L. T. Rep., 706; 14 App. Cas., 519; 8 Asp. Mar. Law Cas., 433
5 Natal, aff., 3rd February, 1905, 91 L. T. R., 206

GENERAL AVERAGE.

WAVERTREE RAILWAY SHIP COMPANY v. LOVE.[1]

9. There is no obligation on a shipowner to have a general average statement made up at the ship's port of destination, or at any particular place, so long as it is made up in a reasonable time.

10. The parties to an average bond agreed to pay their proper and respective proportions of any general average charges to which they might be liable, and forthwith to furnish to the captain or owners of the ship a correct account and particulars of the value of the goods delivered to them respectively, in order that any such general average charges might be ascertained and ajusted in the usual manner. It was held that there was no implied condition to employ an average stater residing at the port of discharge.

LORD HERSCHELL, page 578:—The profession or calling of an average stater, or average adjuster, as it is sometimes called, is of comparatively modern origin. The right to receive and the obligation to make general average contribution existed long before any class of persons devoted themselves as their calling to the preparation of average statements. It was formerly, according to Lord Tenterden, the practice to employ an insurance broker for the purpose. The shipowner was not bound to employ a member of any particular class of persons, or, indeed, to employ any one at all. He might, if he pleased, make out his own average statement, and he may do the same at the present time if so minded. If he engages the services of an average stater, it is merely as a matter of business convenience on his part. The average stater is not engaged, nor does he act on behalf of any of the other parties concerned, nor does his statement bind them. It is put forward by his shipowner as representing his view of the general average rights and obligations, but the statement or adjustment is open to question in every particular by any of the parties who may be called on to contribute.

Page 578:—The learned judges in the court below rested their judgment mainly on the law laid down by Lord Tenterden in the case of *Simonds* v. *White*.[2] "The shipper of goods," said the learned judge, "tacitly, if not expressly, assents to general average

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1 New South Wales, rev., 22nd May, 1897, 76 L. T. R., n.s., p. 576; 13 T.L. Rep. 149.

2 2 B. and C., 805.

as a known maritime usage which may according to the events of the voyage be either beneficial or disadvantageous. And by assenting to general average he must be understood to assent also to its adjustment at the usual and proper place: and to all this it seems to us to be only an obvious consequence to add that he must be understood to consent also to its adjustment according to the usage and laws of the place at which adjustment is to be made. The words relied on are that the shippers must be understood to assent to the adjustment of general average at the usual and proper place." In their Lordships, opinion, however, these words do not refer to the preparation of an average statement, but to the actual settlement and adjustment of the general average contributions. The preparation of a general average statement which does not bind the shipper is not "the adjustment" of general average. In order to understand Lord Tenterden's language it is necessary to bear in mind what would happen if all parties stood on their rights. The shipowner would hold the goods until he obtained the general average contribution to which they were subject. If the owner of the goods disputed his claim, he would appeal to the tribunal of the country to obtain possession of them on payment on what was due. These tribunals would have to determine whether the owner of the goods was entitled to them and what payment he must make to release. It would naturally follow, as Lord Tenterden said, that the parties must be understood as consenting to the adjustment according to the law there administered; but all this has, in their Lordships' opinion, nothing to do with the mere employment by the shipowner of an average adjuster to prepare a statement on his behalf. In Lord Tenterden's time professional average adjusters were not as commonly to be found in the different ports of discharge as they are at present. It was argued that, if the shipowner procured the statement by means of an average stater at a distance, shippers might be subjected to much delay and consequence prejudice. Their Lordships do not doubt that the shipowner must act reasonably and that if, owing to his taking unreasonably long time in presenting his general average statement, other parties are prejudiced and suffer damage by unreasonable delay, he may incur liability.

LIEN FOR FREIGHT.

TURNER ET AL. v. HAJI SAOLAM MAHOMED AZAM.[1]

11. Notice of a charter-party given to a shipper has not the effect of incorporating into the bill of lading any terms inconsistent with it, which the captain was not bound to embody in it.

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1 Bombay, aff., 22nd June, 1904, 91 L. T. R. 216; 72 L. J. R., n.s., 17; 20 T. L. Rep. 599

12. Therefore a shipowner is not entitled to a lien for freight payable under a time charter on goods shipped by a person not a party to that charter, whose goods were carried in the ship under a sub-charter and bill of lading.

LORD LINDLEY, page 219: — Under these circumstances the shipowners appear to their Lordships to have contracted with the sub-charterer that his sugar should be carried to Bombay in that ship on the terms of the bill of lading. This distinguishes the present case from *Cocrin v. Newberry*[1] where the bill of lading given by the captain of a chartered ship was held to bind the charterer only, although the shipowners retained possession of the ship by the captain. Nor is the present case governed by *Small v. Moates*,[2] and other cases of that class, where the holder of the bill of lading had no better title than the charterer who was himself the captain of the ship, and the original shipper of the goods. It further appears to their Lordships that the bills of lading in this case are not mere receipts for goods given to a charterer already bound to the shipowner by a charterer-party entered into between them from which the captain had no authority to depart. Unless, therefore, the fact that the sub-charterer had notice of the time charter makes a difference, the bills of lading entitled him to have his goods delivered to him on payment of the bills of lading and freight. This was decided in *Fry v. Chartered Mercantile Bank of India*[3] which was followed in *Gardner v. Frechmann*.[4] In both of these cases the bill of lading expressly referred to the charter-party, but not in such a way as to incorporate either the obligation to pay the charter freight or the lien for it. These cases, and other like them, show that notice by a shipper of a charter-party has not the effect of incorporating into the bill of lading any terms which are inconsistent with it, and which the captain was not bound to embody in the bill of lading. If the charter-party shows that the captain exceeded his authority in signing the bill of lading, and the shipper knew this, he cannot enforce the terms of the bill of lading uncontrolled by the charter-party. If the shipper knew that there was a charter-party and had an opportunity of reading it, and did not trouble himself about it, he might be treated as knowing its contents. .

There can be no doubt that the sub-charterer must, for this purpose, be regarded as an agent of the charterer. The words "without prejudice to this charter" mean that the rights of the shipowners against the time charterers, and *vice versa* are to be preserved. That this is the true meaning and legal effect of the words

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1 1 C. & Fin. 283
2 9 Bing. 574
3 14 L. T. Rep. 709.
4 53 L. T. Rep. 518; 15 Q. B. Div. 154.

"without prejudice to this charter" has often been the subject of controversy and of judicial decision, and has not been treated as settled by authority. In *Hanson v. Harrold Brothers*,[1] Lord Esher, M.R., said that its meaning was "that it is a term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered." It means no more.

UNSEAWORTHINESS.

MASTER AND OWNERS OF S.S. CITY OF LINCOLN v. SMITH[2]

13. Unless the conditions of a charter-party relieve the owner as distinct from his servants and agents from the consequences of personal negligence, he is liable if his ship, in other respects seaworthy, is rendered unseaworthy in being so laden under his orders as to become too heavy at starting, with the result that her deck cargo was partly jettisoned and partly swept overboard in a gale which otherwise could have been weathered in safety.

LORD MACNAGHTEN, page 255:— In the argument before their Lordships very little was said about the exceptions in the charter-party. Indeed, that point was hardly open then. It had been practically concluded by what occurred in *Western v. Case*. There a ship was chartered to carry cattle from La Plata to England. The charter was identical in its terms with the charter of the City of Lincoln. The ship was overburdened and rolled so heavily that the cattle were lost. Matthew, J., held the owner liable. He thought the owner had been personally negligent, and that there was nothing in the charter to excuse him from the consequences of personal negligence. On appeal, both in the Court of Appeal and the House of Lords, it was held that the owner was protected, not because personal negligence was covered and excused by the conditions of contract, but because there was no case of personal negligence at all. It appeared that at the time when the charter was made and at the time when the vessel was being loaded the owner was in this country. He had left the management of the vessel in the hands of duly qualified and competent persons. Against the consequences of negligence on the part of servants and agents the conditions of the charter-party were a protection. In the present case no one but the owner had anything to do with the loading of the vessel. The charterer had no right to interfere. It was not his province to load or to stow the vessel. His business was to provide a cargo in accordance with the conditions of the charter-party. To do the owner justice

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1 70 L. T. Rep. 475, 1874; 12 R., 612.

2 Natal, aff., 3rd February, 1904, L. R., 1904, App. Cas., 250; 75 L. J. R., n.s., 45.

he did not attempt to excuse himself by throwing the blame on the stevedore or the captain or anybody else. He did not for a moment dispute his responsibility in regard to loading or ballasted. She was loaded (he said) and ballasted "as proposed." Indeed, he went so far as to declare that he would have no hesitation, in the event of a similar cargo being offered, to load the City of Lincoln in the same way and ballast her in the same manner.

ALIEN

See LEGISLATURE: *Eod vo.*

APPEAL.

APPEALABLE VALUE.

MANLEY v. TALACHE[1]

1. Where the claim on a counter-claim is below the appealable amount, an appeal will nevertheless lie if the whole amount of the claim in the action exceeds that amount.

FALKNERS GOLD MINING COMPANY v. MCKINNERY[2]

2. The statute, Mining Act, of New South Wales, section 115, gives a right of appeal to the Supreme Court in mining cases where the amount involved is not less than 500 £.:

3. It was held that the Supreme Court was wrong in refusing to hear an appeal on the ground that the value should be found and stated by the Court appealed from, and could not be ascertained by themselves on affidavit.

MOHEDEEN HADJIAR v. PITCHEY.[3]

4. The proper measure of value for determining the question as to the right of a plaintiff to appeal is the amount in respect of which the suit was dismissed, including *mesne* profits, if claimed by the plaintiff.

GILLETT ET AL. v. LUMSDEN.[4]

5. In an action for infringement of a trade-mark and for passing off goods as those of the plaintiff, the defendant appealed to the Privy Council from the judgement of the Court of Appeal for Ontario. That Court had not allowed the bringing

1 Jamaica, 27th July, 1895, 73 L. T. R., n.s., p. 98.
2 New South Wales, rev., 27th July, 1901 L. R., 1901, App Cas., 580.
3 Ceylon, 27th April, 1903, 62 L. J. R., 96.
4 Ontario, aff., 28th July, 1905, 21 T. L. Rep., 698

of the appeal to the Privy Council as involving a matter, exceeding the value of $4000.00 within s. 1, of the Revised Statutes of Ontario, 1897, c. 48, but had left the question of the competency of the appeal open.

6. It was held that the appeal was not competent, and must be dismissed.

COLONIAL COURTS OF ADMIRALTY.

RICHELIEU & ONTARIO NAVIGATION COMPANY v. OWNERS OF S.S. CAPE BRETON.[1]

7. Notwithstanding the provisions of the Canadian Supreme and Exchequer Courts Act, 1875, with respect to the finality of the judgments of the Supreme court, an appeal lies as of right under s. 6 of the Colonial Courts of Admiralty Act 1890, from a judgment of the said Court when pronounced in an appeal thereto from a decree of the Colonial Court of Admiralty constituted in pursuance of and exercising jurisdiction under the said Act.

COSTS IN CASES WITH THE CROWN.

JOHNSON v. THE KING.[2]

8. In cases between the Crown and a subject, the rule of the Judicial Committee, in dealing with costs, will in future be that the Crown neither pays nor receives costs, unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.

LORD MACNAGHTEN, page 237:—As regard costs, their Lordships have heard a separate argument, and they desire to say that they are much obliged to the learned counsel on both sides for the industry and care which they have bestowed upon the questions. It will be enough to state the conclusions at which their Lordships have arrived. It cannot be disputed that over and over again, before this tribunal, the Crown has been treated in the matter of costs just like a private litigant. It appears, however, that no case can be found in which the point was argued. All the cases seem to fall under one or other of the following three heads:—(1) Cases where the Crown has been treated as an ordinary litigant, under the authority of local statutes, as is generally the case in

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1 Supr. Court, Canada, aff., 11th November, 1906, L. R., 1907, App. Cas. 112; 94 L. T. R. 896; 23 T. L. R. 185; 76 L. J., n.s., 14.

2 Sierra Leone, rev., 12th July, 1904, 91 L. T. R., 234; 53 W. Rep., 207; 20 T. L. Rep., 697.

the self-governing colonies; (2) Cases where the question arose under a petition of right or some proceeding analogous to a petition of right; (3) Exceptional cases where justice seemed to require that the Crown should pay costs, or where the Crown was not unwilling to be treated as an ordinary litigant. The present case cannot be brought under any of these heads. There is no ordinance in Sierra Leone authorising the court to treat the Crown as an ordinary litigant, and the appellant has succeeded in spite of demerits. Mr. Muir Mackenzie relied on sect. 19 of the ordinance of the 10th Nov., 1881, which declares that statutes of general application which were in force in England on the 1st January, 1880, should be in force in Sierra Leone from the date of the ordinance coming into effect. He contended that that section imported into the colony the Act 18 and 19 Vict., c. 90. Their Lordships, however, are of opinion that that act is not a statute of general application within the meaning of sect. 19 of the ordinance in question. It only deals with proceedings in the United Kingdom. In the result, therefore, their Lordships are of opinion, that in dealing in costs in cases between the Crown and a subject, this board ought to adhere to the practice of the House of Lords, and that in future the rule should be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.

COURT MARTIAL.

EX PARTE MARAIS[1]

9. Where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals.

10. The fact that for some purposes tribunals have been permitted to pursue their ordinary courses in a district in which martial law has been proclaimed is not conclusive that war is not raging.

11. Special leave to appeal refused from a judgment affirming the rightful custody of the petitioner by the military authority in a district in which martial law prevails.

ATTORNEY-GENERAL FOR THE CAPE COLONY v. VAN BEENERS.[2]

12. A memorandum of the charge, judgment, and sentence of a court of martial law, made by a resident magistrate acting as Deputy Administrator of Martial Law, is not in any sense a "record" and a civil court has no jurisdiction to review it.

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1 Cape of Good Hope, 18th December, 1901, L. R., 1902, App. Cas., 109; 82 L. T. R. 734; 71 L. J. R., n.s., 43; 50 W. Rep. 273.
2 Cape Colony rev., 9th December, 1903, 87 L. T. R., 591

TILONKO v. ATTORNEY-GENERAL FOR NATAL.[1]

13. Courts administering martial law in time of war bear no analogy to courts-martials administering military law under the Mutiny Act. The right to administer martial law depends upon whether a state of war in fact exists, and not upon the fact of a proclamation of martial law having been made.

14. But where a Colonial Legislature had passed an Act of Parliament which enacted that all sentences passed by such courts were to be deemed sentences passed in the regular and ordinary course of criminal jurisdiction.

15. It was held that the Judicial Committee had no power to inquire into the propriety or impropriety of passing such an Act, and could not give leave to appeal from the sentence passed by such court.

THE EARL OF HALSBURY, page 854:—This is an application for special leave to appeal, which their Lordships have no difficulty in advising His Majesty to refuse. The foundation upon which counsel for the petitioner has proceeded is a totally inaccurate analogy between the proceedings of a military court sitting under what is called the Mutiny Act, and proceedings which are not constituted according to any system of law at all. It is by this time a very familiar observation that what is called "martial law" is no law at all. The notion that "martial law" exists by reason of the proclamation—an expression which the learned counsel has more than once used—is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law a[illegible] It depends upon the question whether there is war or not. [illegible] s war, there is the right to repel force by force, but it is f[illegible] venient and decorous, from time to time, to authorise what [illegible] called "courts" to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved. But to attempt to make these proceedings of so-called "courts martial," administering summary justice under the supervision of a military commander, analogous to the regular proceedings of courts of justice is quite illusory. Such acts of justice are justified by necessity, by the fact of actual war; and that they are so justified under the circumstances is a fact that it is no longer necessary to insist upon, because it has been over and over again

1 Natal, 2nd November, 1906, 95 L. T. Rep., 853; L. R., 1907, App. Cas., 93; 23 T. L. R., 21, 668; 76 L. J., n.s., 29.

so decided by courts as to whose authority there can be no doubt. But the question whether war existed or not may, of course, from time to time, be a question of doubt, and if that had been the question in this case, it is possible that some of the observations of the learned counsel with regard to the period of trial, and the course that has been pursued, might have required consideration.

FINAL JUDGMENT.

McDONALD v. BELCHER[1]

16. Where in an action for account, the court, at the request of the plaintiff, selects one item, and in respect thereof after hearing the evidence makes an order that the action be dismissed, such order is a final order and subject to the conditions under which an appeal may be taken therefrom.

FROM HIGH COURT OF AUSTRALIA.

WILFREY ORE CONCENTRATED SYNDICATE v. GUTHRIDGE[2]

17. Special leave to appeal from a decision of the High Court of Australia will not be granted where a matter of private right only and not of public importance is involved.

LORD DAVEY, p. 87:—Their Lordships have very carefully considered this petition and have had an opportunity of considering the arguments by counsel for the petitioners in support of it. They have also looked through the judgment of the learned Chief Justice in the High Court, and they see no fault to find with the law as there laid down. Whether it was rightly applied to the particular case is, of course, another question, but the law as laid down seems to their Lordships to be in entire accordance with the judgment of the House of Lords in the case of *Anglo-American Brush Electric Light Corporation v. King, Brown & Co.*[3] Both the judgments of Lord Halsbury (then Lord Chancellor) and of Lord Watson expressly lay down that the specification is not required to contain "explications or directions which would enable a workman of ordinary skill to construct" the patented invention.

All that is required is that the specification of the patentee should "convey to men of science and employers of labour information which will enable them, without any exercice of inventive ingenuity to understand his invention and to give a workman

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1 Supr. C., Canada, Yukon Territory, rev., 25th April, 1904 73 L. J. R., n.s., 491.

2 Australia, 27th June, 1906, 75 L. J. R. n.s., 87.

3 1882, App. Cas., 367.

the specific directions which he failed to communicate." Therefore the construction of the document was, as the Chief Justice says, a matter for the Court and the Court put its construction upon it, and held that it did disclose the invention in a sufficient way to enable a mining mechanician, or a mining engineer, to give the necessary directions to the skilled workmen who were to make the machine in accordance with it. It appears, therefore, to their Lordships that there is no question of law upon which the judgment of the learned Chief Justice can be objected to. It is a question of great importance, no doubt, but a mere question concerning the value of the patent to the parties themselves, or, in other words, it is a matter of private right, and not one involving any question of public importance.

Counsel for the petitioners said quite truly that this Board had laid down that, in considering the question of whether leave to appeal should be given from the High Court of Australia, it would act upon the same principles on which it has been in the habit of acting in similar applications for leave to appeal from the Supreme Court of Canada, and he referred to the case of *Prince* v. *Gagnon*, in which Lord Fitzgerald specified certain circumstances under which the Board would be disposed to advise an exercise of the prerogative, but the case of *Prince* v. *Gagnon*,[1] was commented upon by Lord Watson in the well-known case of *La Cité de Montréal* v. *Les Ecclésiastiques du Séminaire de St-Sulpice de Montréal*,[2] in the following words:—"It is the duty of their Lordships to advise Her Majesty in the exercice of her prerogative, and in the discharge of that duty they are bound to apply their judicial discretion to the particular facts and circumstances of each case as presented to them. In forming an opinion as to the propriety of allowing an appeal, they must necessarily rely to a very great extent upon the statements contained in the petition with regard to the import and effect of the judgment complained of, and the reasons therein alleged for treating it as an exceptional one, and permitting it to be brought under review. Experience has shown that great caution is required in accepting these reasons when they are not fully substantiated, or do appear to be *prima facie* established by reference to the petitioner's statement of the facts of the case, and the questions of law to which these give rise. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and an attempt to formulate any such rule might therefore prove misleading. In some cases, as in *Prince* v. *Gagnon*,[1] their Lordships have had occasion to indicate certain particulars, the absence of which will have a strong influence in

1 1882, 8 App. Cas., 103.
2 1889, [illegible] J.R., n.s., 20; 14 App. Cas., 660.

inducing them to advise that leave should not be given, but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal."

The present case is said, no doubt, to be of a very substantial character; but in the opinion of their Lordships that is not a sufficient ground to induce them to recommend His Majesty to give leave to appeal from the decision of the High Court of Australia.

FROM HIGHEST COURT IN COLONY.

VICTORIA RAILWAY COMMISSIONERS v. BROWN.[1]

18. Where petitioners for special leave have elected to appeal to the High Court of Australia, from which it is known that there is no further appeal without special leave, their Lordships will not, except in a very special case, entertain their petition.

19. The same rule laid down by the Committee in *Clergue* v. *Murray*,[2] in reference to the Supreme Court of Canada was followed.

LORD DAVEY, p. 382:—Now the High Court of Australia is a Court of the very highest authority, as to which Lord Macnaghten, in delivering the judgment of this Board in the case of the *Daily Telegraph Newspaper Co.* v. *McLaugh in*,[3] says: "It occupies a position of great dignity and supreme authority in the Commonwealth. No appeal lies from it as of right to any tribunal in the Empire." If the parties think fit to appeal to the High Court instead of coming to this Board and the judgment appealed from is affirmed by the High Court, their Lordships will not as a rule entertain a petition for special leave to appeal. Their Lordships say "as a rule" advisedly because it must not be understood that their Lordships disclaim their power of doing so, but a very special case must be made in order to introduce them to exercise their power.

The same point arose with reference to the Supreme Court of Canada in the case of *Clergue* v. *Murray*. After stating the well-known principles upon which this Board has advised leave

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1 Australia, 20th June, 1906, L. R., 1906, App. Cas., 381; 95 L. T. Rep. 73.
2 1903, App. Cas., 521
3 1904, App. Cas., 777

to appeal from the Supreme Court of Canada their Lordships say this:—" And in the case of the *Consumers Cordage Co. v. Connolly* (which was a petition for leave to appeal from a judgment of the Supreme Court of Canada heard by this Board on June 27, 1901), it was said that where a person has elected to go to the Supreme Court it is not the practice to allow him to come to this Board except in very strong case. It is different where a man is taken before the Supreme Court, because he cannot help it. But where a man elects to go to the Supreme Court, having his choice whether he will go there or not, this Board will not give him assistance except under very special circumstances.

FROM SUPREME COURT OF CANADA.

CLERGUE v. MURRAY.

20. According to s. 71 of Revised Statutes of Canada, 1886, c. 135, there is no appeal from any judgment or order of the Supreme Court of Canada except by special leave of his Majesty in Council.

21. Where a suitor, having his choice whether to appeal to Supreme Court or to His Majesty in Council, elects the former remedy, it is not the practice to give him special leave, except in a very strong case.

LORD DAVEY, p. 522:—The principle upon which this Board will advise His Majesty to grant special leave to appeal from the Supreme Court of Canada have been laid down over and over again. Their Lordships repeat these principles now, because it appears from this case, as from other cases, that Canadian counsel do not always observe them. In the case of *Prince v. Gagnon*,[2] this Board said: "Before the constitution of the Supreme Court of the Dominion of Canada there was a right to appeal from the Courts then in existence where the value of the matter in controversy was below £500, but that does not apply to the Supreme Court. The language of the Legislature of the Dominion is:[3] "This judgment of the Supreme Court shall in all cases be final and conclusive. . . . . saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal prerogative: and their Lordships are not prepared to advise Her Majesty to exercise Her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity involving matter of public interest, or some important

1 Supr. C. Canada, 21st June, 1903. L. R. 1903, App. Cas. 521. 89 L. T. R., 373; 72 L. J. R., n.s., 99.
2 8 App. Cas., 103
3 Revised Statutes of Canada, 1886 ch. 135, s. 71

question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character. Accordingly their Lordships did not advise Her Majesty to allow an appeal in that case.

Those principles have been consistently acted on by this Board, and in the case of *Consumers' Cordage Co., Ltd., v. Connolly* (which was a petition for special leave to appeal from a judgment of the Supreme Court of Canada, heard by this Committee on June 27, 1901), it was said that where a person has elected to go to the Supreme Court, it is not the practice to allow him to come to this Board, except in a very strong case. It is different where a man is taken before the Supreme Court, because he cannot help it. But where a man elects to go to the Supreme Court, having his choice whether he will go there or not, this Board will not give him assistance except under special circumstances.

Their Lordships think that Canadian Council out to consider these principles before bringing a case like the present before them. It would be nothing less than a miscarriage of justice, if their Lordships were to impose on the respondents (the defendants in the action) a fourth hearing of the case, with all the expenses attendant upon an appeal to His Majesty in Council, after there have been three decisions in the Canadian Courts, the final decision being that of the Supreme Court of the Dominion, which is entitled to every confidence on the part of the canadian people.

CANADIAN PACIFIC RAILWAY v. BLAIN.[1]

22. Special leave to appeal from a decree of the Supreme Court of Canada will not be granted to a petitioner who has elected to appeal to that Court and not to His Majesty direct, unless a question of law is raised of sufficient importance to justify it.

LORD DAVEY, page 454:—The question which is put forward by the petitioners as the important question of law for the decision of which they ask this Board to advise the Crown to exercise its prerogative of giving leave to appeal from the Supreme Court of Canada is thus stated in the petition: "The petitioners submit that their obligation to their passengers, whether arising out of contract or otherwise, do not include the duty of protecting them against assaults by their fellow-passengers, or render them answerable in damages for failure to afford such protection." Their Lordships are not disposed to advise His Majesty to give leave to appeal from the Supreme Court for the purpose of discussing that question.

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1 Supr. C. Canada, 7th June, 1904. L. R. 1904, App. Cas., 453; 73 L. J. R., 109

They repeat what was said by this Board in the case of *Clergue* v. *Murray, ex parte Clergue*,[1] where, as in the present case, the petitioner elected to appeal to the Supreme Court, and not to His Majesty in Council direct as he might have done. After quoting the case of *Prince* v. *Gagnon*,[2] *and Consumers' Cordage Co., Ltd.*, v. *Connolly*, their Lordships say this: "It would be nothing less than a miscarriage of justice if their Lordships were to impose on the respondents (the defendants in action) a fourth hearing of the case with all the expenses attendant upon an appeal to His Majesty in Council after there have been three decisions in the Canadian Courts, the final decision being that of the Supreme Court of the Dominion which is entitled to every confidence on the part of the Canadian people."

EWING ET AL. V. DOMINION BANK[3]

23. Where no important question of law is involved, and no *prima facie* ground warranting an appeal is made out, special leave to appeal from an order of the Supreme Court of Canada will not be granted.

FROM SUPREME COURT OF AUSTRALIA.

DAILY TELEGRAPH NEWSPAPER COMPANY V. MCLAUGHLIN[4]

24. On a petition for special leave, by virtue of the Royal prerogative, to appeal from the High Court of Australia or the Supreme Court of Canada, the Judicial Committee will apply their judicial discretion to the particular facts and circumstances of each case, and no absolute rule can be laid down as to the principles upon which such an appeal should be allowed.

25. A case may be of a substantial character, and may involve questions of great public interest, and raise an importan question of law, yet if the judgment of the court below is plainly right, or at least not attended with any substantial doubt, their Lordships will not advise His Majesty to grant leave to appeal. Therefore where the court below had, upon a careful review of the facts, set aside a power of attorney, on

1 1903, A. C. 521
2 8 A. C., 103.
3 Supr. C., Canada, 26th July, 1904, 74 L. J. R., n.s., 21.
4 Supr. C., Australia and Canada, 15th July, 1904, 91 L. T. R., 233, 73 L. J. R., n.s., 95; 20 T. L. Rep., 674.

the ground that the plaintiff was not of sound mind capable of understanding what he was doing when he executed it, leave to appeal was refused, though the amount in dispute was very large.

LORD MACNAGHTEN, page 233:—As this is the first instance in which an application has been made for special leave to appeal to His Majesty from a decision of the High Court of Australia, their Lordships think it desirable to state the principles which in their opinion ought to guide this board in tendering advice to His Majesty in such a case. The High Court occupies a position of great dignity and supreme authority in the Commonwealth. No appeal lies from it as of right to any tribunal in the empire. There can be no appeal at all unless His Majesty by virtue of His Royal prerogative thinks fit to grant special leave to appeal to himself in council. In certain cases touching the constitution of the Commonwealth, the Royal prerogative has been waived.

In all other cases it seems to their Lordships that application for special leave to appeal from the High Court ought to be treated in the same manner as applications for special leave to appeal, from the Supreme Court of Canada, an equally august and independent tribunal. And their Lordships think that they cannot do better than repeat the observations which were made by Lord Watson in delivering the judgment of this board in the case of a petition to Her late Majesty in which the city of Montreal was the applicant: *La Cité de Montréal* v. *Les Ecclésiastiques du Séminaire de St-Sulpice de Montréal*:[1] "It is the duty of their Lordships," said Lord Watson in that case, "to advise Her Majesty in the exercise of her prerogative, and in the discharge of that duty, they are bound to apply their judicial discretion to the particular facts and circumstances of each case as presented to them. In forming an opinion as to the propriety of allowing an appeal, they must necessarily rely to a very great extent upon the statements contained in the petition with regard to the import and effect of the judgment complained of, and the reasons thereon alleged for treating it as an exceptional one, and permitting it to be brought under review. Experience has shown that great caution is required in accepting these reasons when they are not fully substantiated, or do not appear to be *prima facie* established by reference to the petitioner's statement of the main facts of the case, and the question of law to which these gave rise. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and an attempt to formulate any such rule might therefore prove misleading. In

1 61 L. T. Rep. 653; 14 App. Cas 660

some cases, as in *Prince* v. *Gagnon*, their Lordships have had occasion to indicate certain particulars, the absence of which would have a strong influence in inducing them to advise that leave should not be given, but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matters of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal." In *Prince* v. *Gagnon*,[1] to which Lord Watson refers, it was stated that their Lordships were not prepared to advise Her late Majesty to exercise Her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of Canada, "save where the case is of gravity involving matter of public interest, or some important question of law, or affect in property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."

FURTHER ORDER TO PAY INTEREST.

BURLAND v. EARLE.[2]

26. Where a decree of the Court of Appeal affirmed by an Order in Council had ordered the repayment of moneys received by the appellant in excess of his salary as manager of company, but was silent as to interest on the sums so overdrawn:

Held, that the Court had power to order interest on further directions as a matter of discretion, but that as it appeared from the judgment of their Lordships that the Order in Council intentionally omitted a direction to that effect, the discretion of the Court below should be overruled. As no claim for interest was made at the commencement of the action, it should be charged only on the amount decreed from the date of the decree of the Court of Appeal.

LORD DAVEY, page 592:—Their Lordships do not doubt the power of the Court on further directions to order payment of interest on a sum found due from a defendant, although the decree declaring the liability contains no direction for payment of interest or the statement of claim does not ask for it. In a case like the present one the plaintiffs are not entitled as of right to interest and the liability for payment of interest is a matter for the discretion of

1 8 Appeal Cases 103

2 Ontario rev., 26th July, 1905, L. R., 1905, App. Cas. 590; 93 L. T. Rep., 313; 74 L. J. R., n.s., 156

the Court, and depends largely on the view which the Court may take as to the conduct of the defendant to be charged and the circumstances under which the liability for payment of the principal sum was incurred. In such a case the question of interest is much more conveniently dealt with at the time when the original liability is declared and when the tribunal has all the evidence bearing on the question before it, and to postpone the question for consideration to a later date before (it may be) a tribunal differently constituted practically involves a consideration of the evidence in the cause, and is at least fraught with some inconvenience. Their Lordships feel this strongly in the present case.

Page 593:—Their Lordships are fully sensible of the obvious objection to their overruling the discretion of the Courts of the Colony on such a question as the present one, and if the case had now come before the Board for the first time they probably would not do so. But being satisfied that if this Board had been asked to allow the full interest claimed on the hearing of the previous appeal it would not have done so, they feel they ought to give effect to their opinion. It does not, however, follow that no interest should be allowed. The Chief Justice suggest that interest should at any rate be allowed from the commencement of the action, when demand for payment was made, but no notice was then given that interest would also be claimed although interest on other claims was asked by the statement of claim. Their Lordships think that justice will be done by allowing interest from November 13th, 1900, the date of the judgment of the Court of Appeal for Ontario and that such interest should be at the rate of 5 per cent. per annum, being the rate prescribed by the Act of Canada, 63 and 64 Vict., c. 29.

IN CRIMINAL CASES.

EX PARTE DEERING[1]

27. His Majesty will not be advised to grant leave to appeal in criminal cases where it is not even suggested or surmised that substantial and grave injustice has been done, either through a disregard of the forms of legal process, or by some violation of the principles of natural justice.

MACREA v. THE QUEEN.[2]

28. Although in very special and exceptional circumstances, leave to appeal in criminal cases may be granted, misdirection by a judge either in leaving a case to a jury where there is no

1 19th May, 1892, L. R., 1892, App. Cas., 422

2 Allahabad, 13th May, 1893, L. R., 1893, App. Cas., 346; 8 T. L. Rep., L., 63

evidence or founded on an incorrect construction of the penal code, even if established, is insufficient for that purpose, especially where no miscarriage of justice are resulted.

EX PARTE CARTER.[1]

29. Special leave to appeal from a verdict and sentence in criminal cases cannot be granted except in very exceptional cases, such as a gross miscarriage of justice or disregard of the forms of legal process.

LORD HALSBURY, page 720:—With reference to the other questions which Sir Frank Lockwood attempted to argue, it is only necessary to say that, save in very exceptional cases, leave to appeal in respect of a criminal investigation is not granted by this Board. The rule is accurately stated as follows, in the cases to which their Lordships referred in the course of the argument: *In re Dwyer*:—"Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

EX PARTE ALFRED.

30. Special leave to appeal is not given in a criminal case where the sentence was founded on the verdict of a jury, and there was evidence for the jury, and no special matter sufficient to countervail it.

THE LORD CHANCELLOR, page 82:—There is no fact established sufficient to countervail the solemn determination of the judges and the jury here. It would be impossible to set aside this conviction on such grounds as have been brought forward. There appears to have been evidence for the jury. Whether or not their Lordships would have formed the same opinion, and found the same verdict, is not the question. If they would not, that is not enough to set aside the verdict of the jury which has been arrived at.

MJOMINI ET AL. v. THE ATTORNEY-GENERAL OF NATAL.[4]

31. Special leave to appeal to His Majesty in Council in respect of the intended execution of certain persons who were condemned to death by a Court-martial in Natal refused.

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1 12 App. Cas., 459

2 Japan, 14th July, 1897, L. R., 1898, App. Cas., 718; 66 L. J. R., n.s., 95

3 Isle of Man, 24th July, 1901, L. R., 1902; App. Cas., 81; 86 L. T. R., 163; 71 L. J. R., n.s., 27

4 Natal, 2nd April, 1906, 22 T. L. Rep., 413

LORD CHANCELLOR, p. 416:—Their Lordships thought it right to sit at the earliest moment in order to hear an application which they were informed concerned a matter of life or death. Having heard it, their Lordships are unable to advise His Majesty to grant this petition. It is not an appeal from a Court, but in substance from the act of the Executive. Evidently the responsible Government of the colony consider that a serious situation exists, for martial law has been proclaimed. The Courts of justice in the colony have not been asked to interpose, and, apart from any question of jurisdiction, any interposition of a judicial character directed with most imperfect knowledge both of the danger that has threatened and may threaten Natal, and of the facts which came before the tribunal of war, would be inconsistent with their Lordships' duties. Their Lordships will humbly advise His Majesty to dismiss the petition.

DE JAGER V. ATTORNEY-GENERAL OF NATAL.[1]

32. A resident alien within British territory owes allegiance to the Crown, and if he assists invaders during the absence of State forces for strategical or other reasons he is rightly convicted of high treason. Special leave to appeal from a judgment to that effect refused.

33. There is no sufficient authority for the doctrine that the alien's duty of allegiance ceases if an enemy makes good his military occupation of the district in which the alien resides.

For the remarks of Lord Loreburn, L.C., see CRIMINAL LAW: *High Treason.*

TOWNSEND V. COX.[2]

34. Under the Canada Temperance Act, 1888 (51 Vict. c. 34), a search warrant was issued and duly executed, and large quantities of intoxicating liquor found on the hotel and premises searched, and a conviction of the appellant subsequently obtained in regard thereto, with a consequent order for the destruction of the liquor:

35. Held, that the Supreme Court having dismissed applications for writs of certiorari to remove into the said Court record of the said search warrant and destruction order, special leave to appeal therefrom must be refused. The decision was

1 Natal, 9th May, 1907, L. R., 1907, App. Cas., 326.
2 Nova Scotia, 1907, L.R., App. Cas., 1907, 514; 76 L.J., 98

plainly right, having regard to section 10 of the Act under which the warrant was issued.

LORD COLLINS, page 517:—On July 10th the appeals came on before their Lordships, who decided to hear the cases on the footing that the appellant had lodged petitions for special leave to appeal. Accordingly, the facts and arguments are fully discussed before their Lordships. In the judgment of this Board, delivered by Lord Watson, in *La Cité de Montréal* v. *Les Ecclésiastiques du Séminaire de St-Sulpice de Montréal*,[1] there is the following passage:—"A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal."

Without venturing to predicate of these appeals any of the propositions in the earlier part of the sentence, their Lordships are clearly of opinion that the last part of the sentence is directly applicable to them. The chief ground of appeal to the Supreme Court was that with respect to the search warrant certain cases had declared that such a warrant could only issue an ancillary to a prosecution already commenced. It was undoubtedly true that certain cases had so decided, but in the following year the Legislature intervened and amended the Act under which the search warrants in those cases had been issued by striking out the words on which the courts had founded their opinion that the commencement of a prosecution was a condition precedent to the issue of a search warrant, and it is under the amended Act that the proceedings now in question took place. Their Lordships cannot doubt that the Legislature, by this simple and artistic amendment, intended to make it impossible to ground a similar contention on the amended sections. Without, therefore, inquiring further into the reasons which have been urged against the granting of special leave in these cases, their Lordships are content to rest their decision upon the authority above cited.

IN FORMA PAUPERIS.

QUINLAN v. CHILD.[2]

36. Where leave to appeal has been obtained in regular form, the appeal may be presented in *forma pauperis*.

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1 61 L. T. Rep., 653. 14 App. Cas., 660.
2 St. Lucia, 22nd May, 1900, 69 L. J. R., n.s., 85; L. R., 1900, App. Cas., 496.

QUINLAN v. QUINLAN.[1]

37. Leave to appeal to the King in Council in *forma pauperis* is not of course, and ought not to be granted where it is made apparent that the proposed appeal is idle and frivolous. An order to that effect discharged when, on the application of the respondent, it appeared that there was no substantial question to be tried, and where the order would not have been made if all the materials had been before their Lordships.

PONAMMA v. ARUMOGAM ET AL.[2]

38. Where a Colonial Code made no provisions for appeals in *forma pauperis*, and it was contended that the case was as regards amount, value, and nature fit to be taken in appeal, special leave was under the circumstances of the case granted.

MITCHELL v. NEW ZEALAND LOAN COMPANY.[3]

39. Petition for special leave to appeal in *forma pauperis* refused on the merits. It was explained that in accordance with English practice, so far as the same was applicable, the absence of a certificate signed by independent counsel, that is, who had not appeared in the Court below, was not in itself a sufficient ground for a local Court of Appeal refusing leave to appeal in similar form from the Court of first instance.

WALKER v. WALKER.[4]

40. It is a rule of general if not universal application that the Judicial Committee will not entertain a petition for leave

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1 St. Lucia, 13th July, 1901, L. R., 1901, App. Cas., 612; 85 L. T. R., 361; 7 L. J. R., n.s., 122.

2 Ceylon, 26th July, 1902, L. R., 1902, App. Cas., 561; 71 L. J. R., n.s., 121.

3 New Zealand, 8th July, 1903, L. R., 1904, App. Cas., 149; 89 L. T. R., 83; 73 L. J. R., n.s. 17.

4 New South Wales, 13th February, 1903, L. R., 1903, App. Cas., 170; 88 L. T. R., 133; 72 L. J. R., n.s., 36.

to prosecute an appeal in *forma pauperis* where the Court below has power to grant leave on the usual conditions, unless on the first instance an application for leave to appeal was made within due time to the Court from which it is proposed that the appeal should be brought.

LORD MACNAGHTEN, page 171:—The registrar has informed their Lordships that during the last four years there have been ten applications for leave to prosecute an appeal in *forma pauperis* bearing on the point under consideration, and that in one of those cases leave was granted, although it appeared from the petition that no application for leave to appeal had been made to the Court below. The circumstances of that case were so peculiar as to justify a departure from the ordinary rule. With the exception of that case the practice on the point now in question seems to have been uniform, and certainly there was one case, an unreported case from New South Wales, *Comber* v. *Hogg*, heard on November 27, 1900, in which it appears from the shorthand notes that the application was refused expressly on the ground that no application for leave to appeal had been made to the Supreme Court.

Their Lordships desire that it should be clearly understood, as a rule of general, if not universal application, that this committee will not entertain a petition for leave to prosecute an appeal in *forma pauperis*, where the Courts below has power to grant leave on the usual conditions, unless in the first instance an application for leave to appeal has been made within due time to the Court from which it is proposed that the appeal should be brought.

IN MATTER OF DISCRETION.

MOSES V. PARKER ET AL[1]

41. The Royal prerogative of granting appeals from courts of justice does not apply to a case whereby the Act of a colonial Legislature a jurisdiction is conferred upon the Supreme Court, but it is expressly provided that the court is to be guided by equity and good conscience only, and is not to be bound by the strict rules of law or by legal technicalities and forms, as the court is not then acting in a judicial character so as to attract the prerogative.

LORD HOBHOUSE, page 113:—If it were clear that appeals ought to be allowed such difficulties would doubtless be met somehow. But there are some arguments to show that a matter is not of an appealable nature. In the case of *Theberge* v. *Landry*,[2] this board had to consider the effect of a Quebec statute which trans-

1 Tasmania, 5th March, 1896, 74 L. T. R., 112; 65 L. J. R., n.s., 18.
2 35 L. T. Rep., 640; App. Cas., 102.

ferred the decision of controverted elections to the Legislative Assembly from the Assembly itself to the Court of Queen's Bench. The statute provided that the judgment of the court should not be susceptible of appeal. Though that provision would destroy the right of a suitor to an appeal, it did not, taken by itself, destroy the prerogative of the Crown to allow one. But this Board held that they must have regard to the special nature of the subject; to the circumstance that election dispute were not mere ordinary civil rights, and that the statute was creating a new and unknown jurisdiction for the purpose of vesting in a particular court the very peculiar jurisdiction up to that time had existed in the Assembly. And they came to the conclusion that the intention of the Legislature was to create a tribunal in a manner which should make its decision final for all purposes, and should not annex to it the incident of being reviewed by the Crown under its prerogative. The reasons there given apply closely to the present case. Applications for land yet ungranted by the Crown are certainly not ordinary civil rights. They are created and regulated by the law of each colony and in this colony of Tasmania were up to 1858 carefully keep out of the province of legal claims. In 185. they were transferred to the court with an express provision that its decision be final. So far the case resembles the Quebec election case. But it has also the very important additional incident that the Legislature ordered the court to be guided by the same principles as were laid down for the commissioner and expressly exonerated them from all rules of law or practice. It is clear to their Lordships that those affairs have been placed in the hands of the judges as persons from whom the best opinion might be obtained and not as a court administering justice between litigants, and they hold that such functions do not attract the prerogative of the Crown to that appeal. In *Therberge* v. *Landry*,[1] the Board pointed out that the case between the parties was one in which they would not think of admitting an appeal if the power existed. Their Lordships make the same remark here. Indeed if they were to cast about for illustrations of the absurdity of appeals under such conditions as were created by the Act of 1858 no more glaring one could be found than the present case. For the petitioner's complaint is that the judges below have not sufficiently availed themselves of their emancipation from rules of law equity and practice, but on the contrary have suffered themselves to be guided by both law and common sense, first, in refusing to look at evidence tendered for the purpose of contradicting the plain words of a formal instrument, and secondly, in giving to that instrument its plain effect in accordance with English law.

JOHNSON v. VOIGHT.[2]

42. Where a Court has a discretion in granting leave of appeal, to impose such terms as it thinks just, it is not a proper

1 35 L. T. R., 640; Opp. Cas., 102.
2 Logos, varied, 12th May, 1896, 65 L. J. R., n.s., 87.

exercise of such discretion, in view of the supposed merits of the case, which on an application for leave to appeal are not properly before it, to impose as a condition of leave the giving of security for payment of the sum awarded by the judgment which the appellant seeks to impeach.

See the cause of KENT v. LA COMMUNAUTÉ DES SŒURS DE CHARITÉ DE LA PROVIDENCE, BANKS AND BANKING, *Nos.* 17 *and* 18, *and the remarks of Lord Davey in fine.*

IN MATTER OF FORM.

THE PALGRAVE GOLD MINING COMPANY v. MCMILLAN [1]

43. Where the merits of a case have been brought fully before a court which has juridiction to deal with it, the Judicial Committee will not reverse the judgment of the court on the ground that the proceedings were commenced in an informal manner.

44. The Judicial Committee will not allow points which were deliberately abandoned in the court below to be argued before them.

IN QUESTION OF COSTS.

SHENTON v. SMITH [2]

45. Where the amount in dispute is below that for which an appeal lies in strict course of law, but special leave to appeal is given on account of the general importance of the question of dispute, the appellant will be put under an obligation to pay the costs of the appeal in any event.

LORD HOBHOUSE, page 133:—The costs of the appeal stand in a different position. The verdict was for £200, which is under the amount for which an appeal lies in strict course of law. Special leave to appeal was granted because of the general nature of question; but the Board think that it would be hard for the individual suitor to bear the costs of an appeal admitted on such a ground, and they therefore put the appellant under the obligation to pay cost in any event. The order will be according to that condition.

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1 Nova Scotia, rev., 23rd July, 1892, 67 L. T. R., n.s., 245.
2 Western Australia, 2nd February, 1895, 72 L. T. R., n.s., 131.

FORGET v. OSTIGNY[1]

46. Where the amount at stake was small and the appellant obtained special leave to appeal on the ground that the question was of wide general interest, especially to those following his calling, he was ordered, though successful in the appeal, to pay the costs of both sides.

McDONALD v. BELCHER[2]

47. Special leave having been granted from a decree of the Supreme Court of Canada, on a petition stating that the construction of the said statute was a matter of general public importance, without stating that it had been repealed:—

48. It was held that as the omission was immaterial and *bona fide* the appellant should not be deprived of his costs.

EARL OF HALSBURY, J.C., page 436:—A preliminary objection was taken by the respondents that the particular statute in question, the construction of which was stated to be a matter of general public importance justifying an application to His Majesty in Council for special leave to appeal, had at the time of such application been repealed, and that the appellant ought to have brought that fact before their Lordships at the time when his application was made. It has not been suggested, and very properly not suggested, that there was any lack of *bona fides* on the part of the appellant. Their Lordships do not, however, consider the point to be such as to affect the question of costs in this case, inasmuch as the real question arising on this appeal, namely, whether or not an order made under the circumstances stated was a final judgment within the meaning of the statute, is as important now as it was then. Their Lordships have already expressed their opinion that it was a final judgment; and it is only necessary to add that some of the confusion and difficulties that have arisen are due to the acts of the respondents themselves. If the causes of action had been allowed to take their ordinary course and the whole matter had been disposed of by the learned judge in the Territorial Court, no question could possibly have arisen, and the learned judge would probably have disposed of the costs, and have used language not open to ambiguity in disposing of the whole litigation. But at the express desire of the respondents themselves,

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1 Quebec, rev., 30th March, 1895, 72 L. T. R., p. 399; L. R., 1895, App. Cas., 318

2 Supr. C., Canada, rev., 28th April, 1904, L. R., 1904, App. Cas., 429; 73 L. J. R., n.s., 91

he took out of the account the particular item of the claim for $50,000, and gave judgment upon that particular item. The compliance with this request of the respondents has probably given rise to all this trouble. But the question whether the order under consideration was or was not a final judgment is as important today as it was before the statute referred to was repealed. The result is that their Lordships find no sufficient reason to deprive the appellant of his ordinary right to the costs of the appeal.

IN QUESTIONS OF FACT.

ALLAN v. MORRISON [1]

49. It is not the practice of the Judicial Committee to review concurrent findings of fact, though it may of course be done in exceptional circumstances.

ARCHAMBAULT ET VIR v. ARCHAMBAULT ET AL. [2]

50. Where there are concurrent findings of fact, as to a testator's competence and freedom from undue influence, the Judicial Committee will not disturb the judgment, unless it b made plain that there has been a miscarriage of justice, or, at least, that the evidence has not been adequately weighed or considered.

LORD DAVEY, page 580:—Their Lordships do not feel called upon to express any judgment of their own on these issues which have been raised, an on which there is this conflict of evidence. The evidence has been considered by the learned judge who tried the action and saw the witnesses. His judgment is a short one, but now the worse for that, and it is expressed in these terms: "Considering that the plaintiff has not proved that the said Dieudonné Archambault was neither sound in mind nor master of his will when he made the testaments, codicils, and donations which are sought to be set aside, and that it has not been established that the said testaments, etc., were the work of the fraud practised by, or the fear inspired by the defendant on the sick brain of the said Dieudonné Archambault, but that it results in the contrary conclusion from the documents in the cause that at all times when these testaments, etc., were consented to and signed the said Dieudonné Archambault enjoyed his mental faculties; that he was in a state to dispose of his goods, and exercised that right freely and without suggestion on the part of the defendant, or of any other

1 New Zealand, aff., 11th July, 1900, L. R., 1900, App. Cas., 604.
2 Quebec, aff., 16th July, 1902, L. R., 1902, App. Cas., 575; 87 L. T. R., 404; 71 L. J. R., n.s., 131

person, and without any fraud or influence having induced him to make such disposition; and that he preserved until his decease the general administration of his goods and control of his fortune."

On that finding the learned judge dismissed the action. It will be observed that the learned judge finds not only that the evidence of the plaintiff was insufficient to prove her case, but that the defendant had affirmatively established the doctor's competence and freedom from undue influence.

The case then came by way of appeal before the Court of King's Bench. The Chief Justice, Sir Alexandre Lacoste, was not sitting, for a particular reason which need not be mentioned, but the case was heard by four judges of that Court, and their unanimous judgment was delivered in a very full and apparently very carefully considered judgment of Bossé, J., with the result that, after reviewing the evidence more fully than it had been reviewed in the judgment of the judge of first instance, the Court of King's Bench unanimously affirmed the judgment and dismissed the action.

Their Lordships, therefore, have concurrent judgments of the two Courts below on what is solely a question of fact; and their Lordships are the more disposed to attach weight to the circumstance from the evident signs, which appear to anybody who will read the judgment of Bossé, J., of the care and pains which the learned judges had taken to go through the evidence, and to form their own conclusions upon it, and not merely to adopt that of the Court below. Of course, even four judges of the Court of King's Bench may err. Everyone is liable to error. No doubt the appellant, and the appellant's counsel, think that the four judges took a wholly erroneous view of the evidence. The appellant's counsel, however, has not succeeded in convincing their Lordships that they did so, and it is plain on the face of their judgment that they have carefully discussed, analysed, and considered the evidence. It is not the practice of this Board to disturb a judgment on a question of fact where the Courts below have unanimously agreed in their conclusion on the evidence, except where it is made plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered. This is certainly not a case in which their Lordships would be disposed to depart from that practice, or in which they would feel called upon to express a decided opinion of their own upon the result to which the evidence leads their minds. In saying this they do not desire to be understood as saying that they see, from their perusal of the evidence, any reason whatever for believing that either the learned judge of first instance or the learned judges in the Court of King's Bench have come to an erroneous conclusion.

WHITNEY v. JOYCE ET AL.[1]

51. Where there are concurrent findings of fact in the courts below, it is incumbent on an appellant to the Judicial Committee to adduce very clear proof that there is error in the judgment appealed from. It is not sufficient to allege that the judges in the courts below have approached the question from a wrong point of view, and have failed to give just weight to various minute circumstances.

LORD MACNAGHTEN, page 75:—The appellant seeks to reverse the judgment of the Court of King's Bench for the Province of Quebec, which affirmed the judgment of the Superior Court of Montreal. Now, it is well settled that when the question is whether concurrent judgments of the courts below shall be reversed on the ground that the judges have taken an erroneous view of the facts, it is incumbent on the appellant to adduce the clearest proof that there is an error in the judgment appealed from, and, so to speak, to put his finger on the mistake. That rule has often been laid down but never more distinctly than in an appeal from the very court from which the present appeal is brought. In the case of *Allen* v. *Quebec Warehouse Company*,[2] the judgment of this Board was delivered by Lord Herschell. His Lordship said: "It has always been the view taken by this Committee in advising Her Majesty, when the question for determination has been whether the concurrent judgment of the judges who have been unanimous below should be supported or reversed, that unless it be shown with absolute clearness that some blunder or error is apparent in the way in which the learned judges below have dealt with the facts, this Committee would not advise Her Majesty that the judgment should be reversed." Then, after quoting judgments of Lord Kingsdown and Lord Cairns to the same effect, his Lordship goes on to say: "Their Lordships entirely adhere to the view thus expressed, and therefore they do not consider that the question they have to determine is, what conclusion they would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the courts below were clearly wrong." In this case six judges—five in the Court of Appeal and the learned judge who heard the evidence and saw the witnesses—have come to the conclusion that the plaintiff Whitney failed to prove the partnership upon which his claim was based. The only difference between the courts is that in the one the opinion was expressed that Joyce and Greenshields were to be believed, while the Court of Appeal

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1 Quebec, aff., 4th July, 1906, 95 T. L. R., 74; 75 L. J. R., n.s., 89

2 56 L. T Rep., 30; 12 App Cas., 101

has refrained from expressing any opinion on that subject. No error was actually shown or even distinctly alleged. The arguments merely came to this—that the judges below must have approached the question from a wrong point of view and failed to give just weight to a number of minute circumstances which have little or no bearing on the vital matter in issue. Nothing, therefore, remains for their Lordships, but humbly to advise His Majesty that the appeal should be dismissed.

PETITIONS OF RIGHT.

REGINA v. DEMERS[1]

52. An appeal lies to Her Majesty in Council from a decision of the Court of Queen's Bench on a Petition of right.

RAISING OF NEW ISSUE.

OWNERS OF THE "SS. PLEIADES v. OWNERS OF THE "SS. JANE" ET AL.[2]

53. Their Lordships will not entertain an appeal in a case of collision on a question of contributory negligence which was not raised in the court below.

CONNECTICUT FIRE INSURANCE COMPANY v. KAVANAGH[3]

54. Where a writ and declaration alleged that the defendant had been guilty of wilful deceit, and had fraudulently effected a transference of fire insurance in his books after a fire had occurred, from a company of which he was agent, to the appellants, of whom he was also agent, with a specific fraudulent purpose, and such charges of fraud and deceit failed:—

55. It was held, that the appellants could not be allowed in final appeal to contend for the first time that the pleadings and evidence disclosed such negligence or breach of duty by the respondent as their agent as is in law sufficient to infer his liability for the amount paid by them under the insurance so transferred. Fraud was of the essence of the declaration

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1 Quebec, rev., 9th December, 1899, L. R., 1900, App. Cas., 103; 81 L. T. R., 795; 690 L. J. R., n.s., 5.

2 V. Admiralty, aff., 14th February, 1891, 60 L. J. R., [illegible]

3 Quebec, aff., 20th July, 1892, L. R., 1892, App. Cas., 473; 67 L. T. R., n.s., 508; 61 L. J. R., n.s., 150; 8 T. L. Rep., 752.

and the evidence of the respondent directed to that issue can not be accepted as representing all that he would have brought forward to rebut a charge of negligence; nor had the points connected with that issue been submitted to the Courts below.

LORD WATSON, page 480:—When a question of law is raised for the first time in the court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interest of justice to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts if fully investigated would have supported the new plea. To accept the proof adduced by a defendant in order to clear himself of a charge of fraud as representing all the evidence which he could have brought forward in order to rebut a charge of negligence, might be attented with the risk of doing injustice.

KARUNARATRIE v. FERDINANDUS ET AL.[1]

56. A Court of appeal ought only to decide in favour of an appellant on a ground put forward for the first time on the hearing of the appeal, if it be satisfied that it has before it beyond all doubt all the facts bearing upon the new contention as completely as if it had been raised at the trial; but, in the absence of a cross-appeal by the next of kin, the decision must be affirmed, but without costs.

LORD LINDLEY, page 330:—On this part of the case their Lordships adhere to the sound principle acted upon by the House of Lords in the case of *The Tasmania*.[2] There negligence on the part of the captain of a ship was relied upon before the Court of Appeal although not investigated at the trial. Lord Herschell said: "I think that a point such as this, not taken at the trial and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested, and it is obvious that no care is exercised in the elucidation of facts not material to them. It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground then put

1 Ceylon, aff., 19th March, 1902, 86 L. T. R. 329
2 63 L. T. Rep. 11; 15 App. Cas. 223

forward for the first time, if it be satisfied beyond doubt, first that it has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial; and, next, that no satisfactory explanation could have been offered by those whose conduct is an opportunity for explanation had been afforded them when in the witness-box." The second and the third issues rendered it necessary to investigate the capacity of the testator and his freedom from undue influence, but practically such a general investigation is very different from an investigation of a more limited range a' pointed to the specific question whether the testator when he made his will was able to understand and understood that he was disposing of his tea and cocoa estates. This question was never raised at the trial, and not having been so raised their Lordships are of opinion that the will should have been upheld or set aside; and not have been upheld as to the movable property and set aside as to immovable property. *In Fulton* v. *Andrew*,[1] *Morrell* v. *Morrell*,[2] and other cases of that sort, where words or clauses have been omitted from the probate, the court has always acted on evidence pointedly addressed to the words or clauses said to have been improperly inserted in the will, and it is obviously most important that this practice should not be departed from. Their Lordships, however, have the satisfaction of feeling that no injustice has been done in this case, for they have come to the conclusion that the decision of the district judge was correct, and that the widow's appeal from it ought to have been dismissed. They have, however, thought it right to point out the objection in principle to the order appealed from in order to prevent a repetition of the mistake which has been made.

Connolly et al. v. Consumer's Cordage Company[3]

57. It is the right and duty of the Court at any stage of a cause to consider, and, if it be proved, to act upon, an illegality which may be fatal to the contention of either party to the litigation, so as to prevent the process of the court from being used to establish a claim which ought not to be enforced.

58. But in a case in which a court of appeal, after argument and before judgment, raised of its own motion the question of the illegality of the contract upon which the action was brought, which had not been raised in argument before them, the Judicial Committee, though, considering the circumstances very suspicious, declined to give judgment upon questions

1 33 L. T. Rep., 209; L. Rep., 7 H. L., 448.
2 46 L. T. Rep., 485; 7 P. Div., 68.
3 Supr. C., Canada, 4th August, 1903, 89 L. T. R. 347.

which had not been raised in the court below, and sent the case back for a new trial.

LORD HALSBURY, L.C., page 349:—With reference to the question of fact, their Lordships entertain no doubt that it is the right and duty of the court at any stage of the cause to consider, and, if it is sufficiently proved to act upon, an illegality which may turn out to be fatal to the claim of either of the parties to the litigation. Their Lordships, however, do not desire to express any opinion on the subject of the supposed illegality of the contract in dispute beyond this, that the whole circumstances were undoubtedly fraught with suspicion, and their Lordships do not doubt that the learned judges had a right, and that it was their duty if they thought the facts were established, to take care that the process of the court should not be used for the purpose of establishing a claim that ought not to be permitted to be enforced in a court of justice. At the same time, when one considers that neither at the original trial nor at any subsequent period was any evidence offered on the question of illegality, it is impossible to resist the cogency of the argument of counsel that he has not had an opportunity of meeting the allegations that are suggested against his client. As already stated, the circumstances are fraught with suspicion; but, suspicious as they are, they may, nevertheless, be susceptible of explanation, and, if so, the opportunity for explanation and defence ought to have been given. That has not been done; and whatever may be the suspicions that their Lordships, in common with the learned judges below, may entertain upon the subject, mere suspicion, without judicial proof, is not sufficient for a court of justice to act upon. Their Lordships are accordingly unable to affirm the judgment of the Supreme Court in regard to the question of illegality. The question is now raised as to the form and extent of any recommendation to His Majesty which their Lordships are in a position to make that will meet the justice of the case. On the one hand, it is not desirable that all expenses should have been incurred in vain. Their Lordships are therefore disposed to think that, upon proper application to the judges, it would be right that the parties should be permitted to ask, and, if the learned judges agree to it, to make use of the evidence which has already been given. Again with reference to the question of the illegal agreement, and its effect, their Lordships think that opportunity should be given to those who are the natural and proper guardians of the administration of the law, to intervene if they think fit. Their Lordships do not entertain any doubt that, upon properly framed pleadings, the *prima facie* right of the plaintiffs to recover the money lent could be established, and that but for the question of the illegality of the contract, this would be an undefended action. Their Lordships have, therefore, had carefully to consider in what way they can, after all this lapse of time, meet the justice of the

case, and give to the parties the right that are respectively due to them.

See remarks of Lord Davey in *Archambault* v. *Archambault*, vo. GIFTS: *Don manuel*

SECURITY IN APPEALS.

THE HESKETTS[1]

59. The rule 15th of the Privy Council, Rule of 1865, regulating appellate procedure from Vice-Admiralty Courts by which an appellant is required to give bail in £200, to answer the cost of appeal is not impliedly repealed by rule 150 of the Vice-Admiralty Court, Rules of 1883, by which an appellant may be required to give security not exceeding £300 for the costs of the appeal, but the Judicial Committee has a discretion in fitting cases to dispense the appellant from giving security under rule 15th of the Privy Council Rules 1865.

LORD HOBHOUSE, page 306:—Their Lordships entertain no doubt that they have the power in fitting cases to dispense with the provisions of the earlier Order-in-Council. They think that the circumstances of the case make it a fitting case, and they therefore relieve the appellants from giving further security. Their Lordships, therefore, so order and direct the costs of this application to be costs in the cause.

SPECIAL APPLICATIONS.

REX v. LOUW.[2]

60. Special leave will not be granted to appeal from a judgment which is not impeached, merely with a view to have an abstract point of law, not arising in the case, decided by their Lordships.

EARL OF HALSBURY, page 414:—Their Lordships are asked, in the exercise of their constitutional function, to advise His Majesty, under the terms of sect. 51 of the Charter of Justice for the Colony, to admit an appeal from a "judgment or determination" of the Supreme Court with a view to the same being reversed, corrected, or varied. There has, however, been no "judgment or determination" in this case which can be, or which, indeed, is sought to be, either reversed, corrected, or varied. It is admitted by the petitioner that the judgment of the Supreme Court is to stand, and the object of the petition is to have an abstract point of law which did not arise in the case and never ought to have

1 New South Wales, 14th November, 1891, 66 T. L. R., 305

2 Cape of Good Hope, 8th June, 1904, L. R., App. Cas., 412; 91 L. T. R., 210; 73 L. J. R., n.s., 65.

been reserved at all, determined now by way of appeal. It would be extremely inconvenient, and wholly unprecedented, to pick out of a trial some observation of the learned judge and to ask to have an appeal upon it, although the facts at the trial and the determination of the trial did not raise the question at all.

ROBINSON v. CANADIAN PACIFIC RAILWAY COMPANY[1]

61. Special leave to appeal was granted in this case for reasons stated by Lord Watson as follows:—On the application of the appellants, their Lordships humbly advised Her Majesty to grant special leave to appeal against that part of the judgment which sustain the new plea raised by the respondents after the second trial.

62. In making their recommendation, their Lordships were influenced by these considerations—the general importance to the Province of Quebec of the question arising upon the construction of its Civil Code; the great difference of judicial opinion which it evoked, and the facts that the decision of the majority in the Supreme Court appears, from the judgment of Mr. Justice Taschereau, to have been based to some extent upon the authority of English decisions.

LORD WATSON, page 487:—In the course of the argument counsel for the parties brought somewhat fully under their Lordships' notice the law of reparation applicable to cases like the present as it existed prior to the inactment of the Code; and they discussed the question whether, and if so, how far, c. 78 of the Statute of 1859 altered or superseded the rules of the old French law. These may be interesting topics, but they are foreign to the present case, if the provision of sect. 1056 apply to it and are themselves intelligible and free from ambiguity. The language used by Lord Herchell in *Bank of England* v. *Vagliano Brothers*,[2] with reference to the Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), as equal application to the Code of Lower Canada: "The purposes of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities." Their Lordships do not doubt that, as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses languages which had previously acquired a technical meaning. But an appeal to earlier law and decisisons for the purpose

1 23rd July, 1892, L. R., 1892, App. Cas., 481; 67 L. T. R., 505
2 1 App. Cas., 145.

of interpreting a statutory Code can only be justified upon some such special ground.

MONTREAL GAS CO. v. CADIEUX[1]

63. Special leave to appeal may be given on terms that the appellants should be liable to pay the respondent's cost in any event.

QUINLAN v. CHILD.[2]

64. On petition for special leave to appeal from a decree in a matrimonial separation suit, and in a mortgage suit, from an order for execution of the last-mentioned decree:—

65. It was held that there being ground for appealing from the mortgage decree, the leave should be extended to both suits, which were mixed up together.

66. Their Lordships have no jurisdiction to order a stay of sale in execution.

EX PARTE GREGORY.[3]

67. Neither under the Victoria Lunacy Act of 1890 nor under a *habeas corpus* is a person lawfully detained as a lunatic entitled as of right to have the question of his lunacy decided by means of a jury.

68. Special leave to appeal from certain orders of Court refused, the petitioner's object being to obtain a jury's decision as to his lunacy.

WILFLEY ORE CONCENTRATOR SYNDICATE v. GUTHRIDGE.[4]

69. Where a case raises no question of law, and does not involve any question of public importance, special leave to appeal will not be given merely upon the ground that the case is of a substantial character and of great importance to the parties.

70. The questions of the application of that law to the particular case involving simply the construction of a document, however, substantial as between the parties, was not one of

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1 Supr. C., Canada, 12th July, 1898, L. R., 1898, App. Cas., 718; 81 L. T. R., 276; 67 L. J. R., n.s., 115.

2 St. Lucia, 22nd May, 1900, L. R., 1900, App. Cas., 496; 69 L. J. R., n.s., 185.

3 Victoria, 28th July, 1900, L. R., 1901, App. Cas., 128.

4 Australia, 27th June, 1906, 95 T. L.,Rep., 73; L. R., 1906, App. Cas., 548.

public importance, and there was no sufficient ground shewn for granting the petition.

For the remarks of their Lordships see above under No. 17.

TILONKO v. THE ATTORNEY-GENERAL OF THE COLONY OF NATAL.[1]

71. Special leave to appeal refused where the question raised had been settled by an Act of the Colonial Legislature.

LORD LOREBURN, L.C., page 461:—Their Lordships are unable to advise His Majesty to grant special leave to appeal in this case. The question raised is settled by an Act of Natal, and it is not within the power, or within the province, of this Board to discuss or consider the policy or expediency or wisdom of an Act, or to do anything beyond deciding whether the Act applies. Their Lordships are of opinion that the Act applies, and they are bound by it, and must give effect to it.

TIME FOR APPEALING.

GRIEVE v. PARKER.[2]

72. The Judicial Committee will not allow an appellant who is out of time for appealing against an order to make a fresh application for the same thing to the court below in order to bring himself within time for appealing against the second order.

73. Where there has been great delay on the part of an appellant in the assertion of his alleged rights, and he has neglected to bring all the facts known to him properly before the court below, the Judicial Committee will not extend the time for appealing.

LORD DAVEY, page 115:—It need scarcely be stated that this Board would never allow an appellant, who is out of time for appealing from an order, to make a fresh application to the court for the same thing over again, and to get refused in order to enable him to bring himself within time. It would be trifling with the practice of the Board to allow him to do so. The appellant seems to be perfectly aware of his difficulty, because in his present petition he asks for leave to appeal against the orders of the 7th June, 1899, and the 29th August, 1904. He is perfectly aware of the

1 Natal, 1907, L. R., App. Cas., 1907, 461; 76 L. J., n.s., 1105.
2 Newfoundland, 28th November, 1905, 94 L. T. R., 115; 75 L. T., P. C., n.s., 12.

objection which has been stated to the competency of his appeal. Their Lordships are not prepared to say that the appellant ought to have leave to extend his appeal in that manner. He is asking for an indulgence from the Board. Is he in a position to ask for that indulgence? Having regard to the delay he has allowed to take place in the assention of what he thinks are his rights, and to his neglect, when all the facts were known to him and his advisers to bring the matter properly before the court, and having regard, further, to the impossibility of his getting any relief, such as was refused to him by the order of the 6th June, 1899, and the 29th August, 1904, without setting aside the final judgment of the 6th April, 1898, their Lordships think it is not a case in which they should advise His Majesty to allow him to extend the appeal in the manner sought.

ARBITRATION.

AWARD.

ATLANTIC & NORTH-WEST RAILWAY COMPANY v. WOOD ET AL.[1]

1. Where an award of compensation, made in an arbitration under the Canadian Railway Act, 1888 (51 Vict., c. 29), was appealed from, it was held that the Court rightly exercised its jurisdiction by reviewing the award as if it had been the judgment of a subordinate court; that is, by deciding whether a reasonable estimate of the evidence had been made. It was not authorized by the section to disregard the award and deal with the evidence *de novo*, as if it had been a court of first instance.

LORD SHAND, page 263:—It appears to their Lordships that this was not the intention of the Legislature, and that what was intended by the statute was not that the Court should thus entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award given by them on its merits on the facts as well as the law. Previously to this enactment the Court had power only to approve of or set aside the award of arbitrators. This might often cause much expense and inconvenience in renewed proceedings before the arbitrators, and the purpose of the Legislature seems to have been to enable the Court to avoid this, by giving power to make or rather to reform the award by correcting any erroneous view which the arbitrators might have taken of the evidence, that, in short, they should review the judgment of the arbitrators as they would that of a subordinate

1 Quebec, 1894, aff., L. R., 1895, App. Cas., 257.

court, in a case of original jurisdiction, where review is provided for. And it is in this view worthy of notice that the enacting words of sub-sect. 2 of sect. 161 are followed by this provision of sub-sect. 3. "Upon such appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from a decision of an inferior court to the said Court."

Falkingham v. Victorian Railway Commissioner [1]

2. In an action upon an award the defendants pleaded that the lump sum awarded included matters, claims, and demands in respect of which the arbitrators had no judridiction, as not having seen referable to them under the terms of the contract between the parties:—

3. As it appeared that the matters actually referred were those contained in the submission, the award was not bad on the face of it by reason that it did not state that matters not referred had been rejected from consideration, because the arbitrators had taken evidence on matters not referred, but not shown to have been irrelevant to the inquiry, or to have been included in the award of the lump sum.

4. The defendants having counter-claimed in respect of liquidated damages for delays not allowed in writing by their engineers-in-chief:—

5. The counter-claim must be disallowed, for the refusal to allow delays was itself by the terms of the contract subject to arbitration, and a final award was by the same competent without sending the matter back to the engineer.

Lord Davey, page 463:—Their Lordships agree that if a lump sum be awarded by an arbitrator and it appears on the face of the award, or be proved by extrinsic evidence, that in arriving at the lump sum matters were taken into account which the arbitrator had no jurisdiction to consider, the award is bad. In the present case the submission is to be found in the contract between the parties and the respective appointments by them of arbitrators, and the reference was only of those claims made by the appellants which were within the terms of the submission. In *Backett* v. *Midland Ry. Co.*,[2] and the other case of *Fisher* v. *Pimbley*[3] the

1 Victoria, rev., 6th April, 1900, L. R., 1900, App. Cas., 452; 82 L. T. R., 506; 69 L. J. R., n.s., 89.
2 L. R., 1 C. P., 241.
3 1809, 11 East, 188.

excess appeared on the face of the award was bad because it did not in terms state that the arbitrators had rejected from their consideration those claims of the appellants, which were not properly referable, and it was therefore consistent with the award that those claims had in fact been considered by the arbitrators, and had been taken into account by them in arriving at the lump sum awarded. Their Lordships are not aware of any authority for this position, and they think it would be contrary to principle to hold an award bad because the possibility that matters not within the jurisdiction of the arbitrators may have been taken into account is not in terms included on the face of the award. It is true that in inferior courts the maxim "*Omnia praesumuntur rite esse acta*" does not apply to give jurisdiction, as was laid down by the Court of Queen's Bench in *Rex* v. *All Saints, Southampton*,[1] and by Willes, J., in *Mayor of London* v. *Cox*.[2] That rule is applicable to the award of an arbitrator where no jurisdiction is shewn to make the award, but where, as in the present case, there is jurisdiction to make an award, and the question is only of a possible excess of jurisdiction it has no application. In such a case the award can only be impeached by shewing that the arbitrator did, in fact, exceed his jurisdiction. Their Lordships, therefore, think that this award of the lump sum is not bad on the face of it.

It was then argued that the award was shewn to be bad because it appeared from the evidence that the arbitrators had spent some days in taking evidence on the claims which were admittedly not referable. The dictum of Cleasby, B., was quoted, that "a person exceeds his jurisdiction by prosecuting a judicial inquiry in a matter over which he has no jurisdiction quite independent of the judgment eventually given." This was, no doubt, right as applied to the circumstances of the case. But if it was intended to lay that an award cannot be maintained whenever it is made to appear that the arbitrator took evidence on matters which turned out not to be within the jurisdiction (as contained by the appellants), their Lordships cannot agree. It may be necessary to take evidence in order to ascertain whether the matter is within his jurisdiction or not, and where the claims referred are so mixed together, as in the present case, it is impossible to say that the evidence might not be received.

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1 1828, 7 R. & C., 85.

2 1867, L. R., 2 H. L., App Cas., 26.

COMMON SCHOOL FUNDS BETWEEN QUEBEC AND ONTARIO.

ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR QUEBEC.[1]

6. Questions between the Provinces of Ontario and Quebec as to the distribution of money in the hands of the Government of Ontario belonging to the "Common School Fund" of the two Provinces, were referred to arbitrators appointed under statute.

7. It was held that the arbitrators had no jurisdiction to entertain a claim of the nature of damages against the Ontario Government in respect of money belonging to the fund which it was alleged that they had wilfully neglected or omitted to collect.

ATTORNEY-GENERAL

POWER TO DISCONTINUE SUIT.

CASGRAIN v. ATLANTIC AND NORTH WEST RAILWAY CO.[2]

1. The Attorney-General is the sole *dominus litis* of his proceedings before courts of justice and can discontinue them without the permission of the court.

2. A *mandamus* cannot issue at the instance of the relator to compel him to proceed.

3. A new Attorney-General cannot retract a discontinuance by his predecessor in office.

LORD WATSON, page 296:—The Attorney-General was the sole *dominus litis*, and had the same right to control the conduct and settlement of the suit as if there had been no relator.

Page 297:—Their Lordships have come without difficulty, and certainly without regret, to the conclusion that the learned appellant has underrated his official powers and privileges. With one exception, the authorities cited appeared to them either to have no bearing on the point or to be inclusive. Sect. 703 of the Revised Statutes of Quebec, 1888, which was not referred to by the appellant's counsel in their opening, and was not noticed in their reply, although cited by the respondents, is, in their Lordships' opinion, conclusive. It enacts that the Attorney-General "has the functions and powers which belong to the office of Attorney-General and Solicitor-General of England respectively,

1 Supr. C., Canada, rev., 12th November, 1902, 87 L. T R., 453; 72 L. J. R., n.s., 9; 19 T. J. Rep., 46.

2 Quebec, aff., 9th February, 1895, L R., 1895; App. Cas., 282; 72 L. T. R., 369; 64 L. J. R., n.s., 88.

by law or usage, in so far as the same are applicable to this province." It is scarcely necessary to observe that the power to discontinue an action independently of the court is possessed by the law officers of England, and that no reason exists for holding that an enactment which confers the same power upon the law officer of the Crown for Lower Canada is inapplicable to that province.

See MANDAMUS: *Eod. vis.*

B

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BANK AND BANKING

ACCEPTATION OF CHEQUES.

GADEN v. NEWFOUNDLAND SAVINGS BANK.[1]

1. Unless a specific usage is proved, the only effect of a drawee bank initialling a cheque drawn upon it, is to certify that it has funds of the drawer in its hands sufficient to meet its payment.

2. A bank, by accepting a deposit of a certified cheque and crediting the depositor with the amount thereof in his account, must be deemed to have accepted it for the purpose of cashing it as the depositor's agent, and could not, in the absence of express agreement to that effect, be deemed to have acquired title to it in consideration of the credit entry, and thus to have gratuitously guaranteed its payment by the drawee bank.

SIR HENRY STRONG, page 286:—In the absence of evidence of any express agreement between the appellant and the officer of the Savings Bank at the time of the deposit, the intention of the parties can only be implied from the circumstances in proof, including the fact that the cheque was certified. Is it to be inferred from this alone that the respondent, which was not a bank of discounts, but whose duty and business it was merely to receive money on deposit, so far departed from its duty as well as from its general course of business, which must be presumed to have been in accordance with its duty, as to have accepted this cheque, not by way of deposit and for the purpose of obtaining the cash for it in the usual way, as the agents of the appellants, but with the intention of acquiring title to it and thus in effect gratuitously guaranteeing its payment? Their Lordships are of opinion that there can be only an answer to this question—that which has been given by the Court below. If there was any such agreement as the appellant sets up, it lay upon her to furnish proof of it, but in this she wholly failed.

As regards authority, no decided case proceeding upon a state of fact precisely similar to the present has been cited, and their Lordships have not been able to discover any such authority in the reports of the English courts. Upon a different state of facts raising substantially the same question as that involved in this

1 Newfoundland, aff., 24th February, 1899, L. R. 1899, App. Cas. 281; 15 T. L. Rep., 288; 80 L. T. R., 32; 68 L. J. R., P. C. 57

appeal, there is, however, ample authority. Had the respondent instead of the drawee bank become insolvent before presentment, and had the cheque been found by its assignees or liquidators in specie amongst the assets, and had it been claimed by them as against the appellant to belong to the estate of the Savings Bank, the question involving the title to the cheque would have been precisely the same as that now presented for decision. In such a case numerous authorities are to be found which apply to the case under appeal. In *Giles* v. *Perkins*,[1] a case arising between the customers of bankers who had become bankrupt and the assignees of the latter, it was held that bills which has been deposited by the customers and credited and treated as cash by the bankers, the depositor being authorized to draw against them, had not become the property of the bankers. The assignees having found such bills in specie in the hands of the bankrupts, and having received payment of them, were held bound to account for the proceeds to the customers whose title to the bills it was held had never been divested. And his case was affirmed and followed in the late case of *Thompson* v. *Giles*,[2] under circumstances even stronger to shew a change of title, inasmuch as in the last case the customers has indorsed the bills. If, therefore, the case had been the converse of that before their Lordships, and the appellant had been claiming title to the cheque instead of seeking to repudiate it, the authorities above cited, which could be largely added to, would be decisive to shew that the cheque had never ceased to be the property of the appellant and no reason can be suggested why the same conclusion should not be reached in the present case.

BLANK CHEQUE.

COLONIAL BANK OF AUSTRALIA v. MARSHALL.[3]

3. The mere fact that the cheque is drawn with spaces which can be utilized for the purpose of fraudulent alteration is not by itself any violation of duty by the customer to his banker.

4. Five cheques were drawn on the defendant bank by the two plaintiffs and defendant M. to the debit of their joint account. After they were signed by the plaintiffs, M. enhanced their apparent amounts by adding words and figures in the bank spaces to the left of those originally written.

5. In a suit to recover the balance of account the bank claimed to debit it with the enhanced amounts of the cheques and the

1 1807. 9 East, 12

2 1824, 2 B. & C., 422

3 Australia, aff., 27th July, 1906, 1. R., 1906, App. Cas., 559; 22 T. L. Rep., 746, 95 T. L. R., Rep., 310; 75 L. J. R., n.s., 76.

jury found that the bank could not, by the exercise of ordinary care and caution, have avoided paying the cheques as altered, and that the cheques were drawn by the plaintiffs in neglect of their duty to the bank:

6. The Judicial Committee held that there was no evidence of negligence on the part of the respondents proper to be left to the jury.

SIR ARTHUR WILSON, page 565:—In the course of the argument of the appeal before their Lordships as well as in the Courts of Australia much was said about the case of *Young v. Grote*,[1] a case always cited in connection with this branch of the law. That case, however, was critically examined in the House of Lords in the case of *Schofield v. Earl of Londesborough*,[2] and the latter case has now become the governing authority which must prevail so far as the principles laid down in it extend.

In order to appreciate the effect of that decision it is necessary to notice the history of the case and the manner in which it came before the House of Lords. The suit was by a holder for value of a bill of exchange against the acceptor in which the plaintiff sought to make the defendant liable for the full apparent amount of the bill accepted by him, and subsequently increased in apparent by a forger, on the ground that the bill, as accepted by the defendant was drawn in a manner so negligent as to have facilitated the forgery subsequently committed. The case was tried before Charles, J., without a jury, and the learned judge had to deal and dealt with the two principal propositions essential to the plaintiff's success. The first was that the law merchant imposes upon everyone who accept a bill of exchange with a view to its circulation the duty of taking reasonable precautions in order to prevent the possibility of its amount being fraudulently increased. That proposition the learned judge accepted. The second principal proposition dealt with by the learned judge was that, on the facts of that case, the acceptor of the bill had been guilty of such negligence as to bring him within the operation of the first proposition. This second proposition was rejected by the learned judge who accordingly dismissed the suit. In order to shew the connection between that case and the present it is sufficient to say that there is no suggested ground of negligence in this case which was not present in *Schofield v. Earl of Londesborough*.[2]

An appeal against the judgment of Charles, J., was brought in the Court of Appeal, and in that Court two of the Lords Justices rejected both propositions, holding not only that no such duty as alleged lies upon the acceptor of a bill of exchange, but also

1 4 Bing. N. C., 253
2 1896, App. Cas., 514

that assuming the existence of such a duty it had not been violated. The third Lord Justice accepted both propositions as correct and thought that the plaintiff in the case ought to succeed.

The appeal to the House of Lords impugned, therefore, the correctness of the two rulings of the majority of the Court of Appeal and the argument proceeded on the same lines. So that both the propositions referred to were directly in question before the House of Lords.

The first proposition was expressly negatived by the House of Lords, but so far the decision does not directly affect the present case for the contractual relation existing between a banker and his customer differentiates their case from that of the acceptor and the holder of a bill, and this was pointed out by several of their Lordships. It was recognized that there is or may be a duty on the part of the drawer of a cheque towards his banker which does not exist on the part of the acceptor of a bill towards the holder. It was recognized that "if the..... customer by any act of his has induced the banker to act upon the document by his act, or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted *to be misled*.[1] No attempt was made to define the extent of such obligation; it was unnecessary to do so in that case, nor do their Lordships propose to attempt any abstract definition of such duty. Indeed, it would be impossible to do so, seeing that the extent of the duty may depend upon an agreed or established course of dealing between the parties.

But the duty which, according to the ruling of the learned Chief Justice, subsists between customer and banker is substantially the same as that contended for in *Scholfield* v. *Earl of Londesborough*,[2] as existing between the acceptor and the holder of a bill. And, as has been pointed out, the House of Lords had before them on the appeal the question whether the Court of Appeal was right in ruling that the facts found in that case (which included everything existing in the present case) did not amount to a breach of the obligation, supposing that obligation to exist.

Not one of the members of their Lordships' House appears to have expressed the slightest disapproval of that ruling, and most of their Lordships distinctly approved of it. The Lord Chancellor[3] expressed his concurrence in the opinion of Lindley, L.J., "that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and the wider proposition of Bovill, C.J., in a former case, *Société Générale* v. *Metropolitan Bank*,[4] that people are not sup-

1 1896, A. C., 523
2 1896, A. C., 514
3 1896, A. C., 532.
4 1873, 27 L. T., 849, 856.

posed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land.[1] *Lord Watson*[1] approved of similar rulings. *Lord Macnaghten*[2] expressed the same opinion, and Lord Davey concurred in the judgment of Lord Watson.

The principles there laid down appear to their Lordships to warrant the proposition that, whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces [illegible] that a forger can utilize them for the purpose of forgery is not itself any violation of that obligation. Their Lordships, therefore, agree with the High Court of Australia in holding that there was no evidence proper to be left to the jury of [illegible] on the part of the respondents. They will humbly advise [illegible] Majesty that this appeal should be dismissed.

EXECUTION OF TRUST.

SIMPSON v. MOLSON'S BANK.

7. Where the respondent bank (incorporated by 18 Vict., c. 202), registered an absolute transfer of its shares, which had been executed by trustees and executors under a will, to one of the residuary legatees, regardless of a provision in the will directing the substitution of the legatee's lawful issue at his death, and the transferee disposed of the shares so as to defeat the rights of the issue:

8. Such registration, unless with actual knowledge of a breach of trust, was not wrongful, having regard to sect. 36 of the Act, which enacts that the bank is not bound to see to the execution of any trusts express, implied, or constructive to which any of its shares may be subject. Notice that the shares were held by the trustees and executors in trust, possession by the bank of a copy of the will, the facts that transfers of other of its shares by the same trustees to other residuary legatees contained notice of substitution, that the president of the bank was also executor of the will, and that the law agent of the bank was also law agent of the executors, held to be insufficient to affect the bank with the knowledge of the particular trust sought to be enforced.

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1 1896, A. C., 540.
2 Ibid., 544
3 Quebec, aff., 23rd February, 1895, L. R., 1895, App. Cas., 270

FORGED CHEQUE.

OGILVIE v. WEST AUSTRALIAN MORTGAGE AND AGENCY CORPORATION [1]

9. A customer of a bank was debited with the amount of certain cheques forged by one of the bank's clerks. On discovering the entry, he communicated the fact to one of the officers, whom the jury by a finding not objected to, found to be an agent of the bank, and who knew of the forgery and procured a written confession of the forger. At the request of his agent the customer forbore from informing the directors, being assured that if he did so the bank would lose all chances of recovering the money, which however was not recovered.

10. In an action against the bank by the customer, the jury found that the customer did not arrange with the forger to withhold information from the bank; that the person whom he informed of the forgery was the bank's agent, and that he kept silence in order to enable the forger to repay the money; that the forger left the colony, and that the customer acted with a view solely to the bank's benefit. These findings were not objected to by the bank.

11. The jury found that the plaintiff's silence did not prejudice the bank; that the bank waived the negligence, if any, of the plaintiff, and that the bank ratified the act of their agent. These findings were objected to.

12. Judgment was entered for the customer, but on motion for a new trial the full Court set aside the findings which had been objected to, and entered judgment for the bank.

13. It was held that the conduct and silence of the appellant did not constitute a legal wrong upon which the bank could rely by way of estoppel.

See PAYMENT OF FRAUDULENT CHEQUE.

LIABILITY OF THE PRESIDENT.

PREFONTAINE v. GRENIER [2]

14. Where the collapse of a bank was due to overdrafts which the cashier, the principal executive officer of the bank under the directors, whose accounts had been duly audited by a board of auditors duly appointed and entirely independent of the

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1 Western Australia, aff., 20th March, 1896, 65 L. J. R., n.s., 46.

2 Quebec, aff., 2nd November, 1906, L. R., 1907, App. Cas., 101; 12 R. L., n.s., 495; 25 L. T. Rep., 623; 23 L. T. R., 27; 76 L. J., 4

directors, had irregularly and improperly allowed to certain customers.

15. By the law of Quebec, as by the law of England, a charge of negligence could not be established against the president of the bank simply by reason of his having in good faith failed to detect the cashier's concealment of such overdrafts.

Dovey v. *Cory* (1901), A.C. 477, followed.

SIR ARTHUR WILSON, page 109:—Before examining the question of his liability, it may be well to notice that the cashier was the principal executive officer of the bank under the directors. There is nothing to shew that either the defendant or his brother directors had any reason to suspect or distrust that officer. The accounts periodically submitted to the directors were prepared by him, or under his direction. They were duly audited by the board of auditors appointed under Sect. 1 of the Act, by the body of *commanditaires*, such auditors being thus entirely independent of the directors. In those accounts the total assets and liabilities of the bank were correctly stated according to the books, but the accounts were so framed as not to disclose the fact that the totals included unauthorized overdrafts. The contention on the part of the plaintiff was that it was the duty of the defendant to have exercised such control as to have detected the overdrafts which were, in fact, concealed from him and from his co-directors.

The alleged duty of the defendant was based, first, upon the fact that he was the president of the bank, and, secondly, that he received a salary for acting in that capacity. Reliance was further placed upon the resolution already cited of May 6th, 1889.

In this country, questions as to the nature and extent of the duty and responsibility of directors and others, in respect of the conduct of the affairs of companies, have been frequently under consideration. Attempts have repeatedly been made to render them personally liable, on the ground that they have trusted the regularly authorized officers of the company; that they have failed to detect, and been misled by misrepresentation or concealment by such officers, when there was no reason for doubting their fidelity. But such attempts have not been successful. It is sufficient to refer to the case of *Dovey* v. *Cory*,[1] in which the subject was fully considered by the House of Lords.

Their Lordships think that in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England, and in the absence of any evidence of custom and course of business to the contrary, the Court of King's Bench was right in accepting the English rulings, because they were based, not upon any special rule of English law, nor upon any circumstances

1 1901, App. Cas., 477

of a local character, but upon the broadest considerations of the nature of the position and the exigencies of business.

The fact that the defendant was remunerated for his services as president does not seem to their Lordships to strengthen the case against him. Indeed, the modest scale of his remuneration is scarcely consistent with the idea that he, a man of considerable position, and with a business of his own, was ever expected to give his time and labour to the detailed control of the work of the bank. It is much more consistent with the idea that he was expected to do what he did, that is to say, to devote some two hours a day to the business of the bank, two hours largely taken up by official interviews.

The resolution of May 6th, 1889, is very hard to follow, and no one has succeeded in construing it clearly, but it seems to their Lordships certainly not to strengthen the case of the plaintiff. So far as anything can be collected from it, it seems to shew that the obligation of the defendant to share the responsibility with the cashier was limited to the "engagements of the bank," whatever those words may mean; and, further, that the directors were also to be bound to approve each transaction falling within that class. The grounds, therefore, put forward by the plaintiff as supporting the general allegation of the defendants' liability, appear to their Lordships insufficient to do so. And, further, the Court of King's Bench was, in their Lordships' opinion, right in laying stress upon the fact that the accounts laid before the defendant and his co-directors, in which it is said that the defendant ought to have detected what was concealed, had been audited by a wholly independent body of auditors, and certified by them as correct, and there is nothing shewn which should have led the defendant to doubt the sufficiency of the audit.

A special charge of negligence was pressed against the defendant, in the argument of the appeal, based upon the evidence of a M. Gagnon, who held the post of inspector under the bank.

There is nothing in the evidence to shew the terms of his appointment, and no formal definition of the extent of his duties. The defendant said in his evidence that Gagnon's duties were limited to the inspection of branches and agencies outside the City of Montreal. On one occasion Gagnon was specially employed to examine into a matter in the head office. He says he was dissatisfied with what he found, and that he pressed upon the defendant that he, Gagnon, should be empowered to make a more complete inspection. He says that his suggestion was not very well received, that the defendant rejected the idea that the inspector should be put to supervise the work of the head official of the bank.

It was contended that the omission to authorize the suggested inspection was an act of negligence on the part of the defendant, and that if the suggested inspection had been carried out, the

overdrafts which led to the fall of the bank would, or might have been, brought to light. Their Lordships are not prepared to say that there was negligence in omitting to sanction an inspection inconsistent with the ordinary method of conducting the affairs of the bank, nor has it been shewn that there was any direct connection between the matters excepted to by Gagnon and the fatal overdrafts.

Their Lordships agree with the Court of King's Bench that the charge of negligence has not been established in fact. It is therefore unnecessary to consider (what might have been a difficult question of law) whether the obligation of the defendant, which, whatever its nature and extent, was primarily a contractual obligation, could be made the ground of an action by an individual member of the corporation, as distinguished from the bank in its entirety, and from the smaller body, the directors or members of the corporation.

LIEN ON SHARES.

BANK OF AFRICA v. HALISBURY GOLD MINING CO.[1]

16. A right of lien may be discharged by a new arrangement between creditor and debtor, the terms of which are incompatible with its retention, and an agreement giving a creditor new and special powers with respect to part of the subjects covered by the original lien may be in such terms as to imply that he is not to have course against the remaining subjects, but the fact of a debtor agreeing to give his creditor authority to sell part of the subjects without notice, upon his making default, is not sufficient to warrant the inference that the creditor is not to realize the other subjects of his security if necessary. It indicates that the burden of the debt shall be cast in priority upon the subjects to which the authority relates, but it does not necessarily imply that the security of the creditor is to be restricted to those subjects.

LIQUIDATION.

KENT v. LA COMMUNAUTÉ DES SŒURS DE CHARITÉ DE LA PROVIDENCE.[2]

17. Under the Canadian Winding-up Act, 1886, ss. 15 and 17, a company in liquidation retains its corporate powers including the power to sue, although such powers must be exercised

1 Natal, aff., 13th February, 1892, 61 L. J. R., 34; 441 W. Rep., 47, 8 T. L. Rep., 322.

2 Quebec, rev., 20th March, 1903, L. R., 1903, App. Cas., 220; 83 L. T. R., 273; 72 L. J. R., n.s., 61; 61 T. L. Rep. 345.

through the liquidator under the authority of the court. The liquidator must sue in his own name or in that of the company, according to the nature of the action: in his own name where he acts as representative of creditors and contributories; in that of the company to recover either its debt or its property.

·18. Where liquidators sued in their own name to recover a debt due to the company:—

It was held that the error was one of form, which the court had power to give leave to amend under articles 516 and 521 of the Code of Civil Procedure. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion.

Lord Davey, page 225:—By section 15 of the Act it is provided that the company from the time of the making of the winding-up order shall cease to carry on its business, except in so far as it is, in the opinion of the liquidator, required for the beneficial winding-up thereof, and transfers of shares and any alteration in the status of the members of the company after the commencement of the winding-up shall be void, but the corporate state and all the corporate powers of the company shall continue until the affairs of the company are wound up. And by section 31, the liquidator is empowered, with the approval of the Court and upon certain notices to creditors and others (amongst other things), to bring or defend any action or suit, or prosecution, or other legal proceeding, civil or criminal, in his own name as liquidator or in the name or on behalf of the company, as the case may be. The company therefore retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The words which have been quoted from the 81st section do not, in the opinion of their Lordships, confer upon the liquidator of the Court a discretion as to the mode on which he shall sue, but enable him to bring the action either in his own name or in that of the company as may be appropriate to the particular action. The office of the liquidator has in fact a double aspect. On the one hand he wields the powers of the company, and on the other hand he is the representative for some purposes of the creditors and contributories. There are, therefore, many cases in which he may sue in his own name, as, *e.g.*, to impeach some act or deed of the company before winding-up which is made voidable in the interest of the creditors and contributories. But their Lordships think that wherever the object of the action is to recover a debt, or to recover or protect property, the title to which is in the

company, the action should be brought in the name of the company.

It was suggested that the liquidators were in fact the holders of the promissory notes, and as such were entitled to sue upon them in their own name. But the declaration is framed on the theory that the bank, and not the liquidators, are the holders of the notes, and leave to amend for the purpose of raising this point was asked for.

The next question is whether leave to amend should have been given. The powers of amending pleadings are contained in Chapter XXIII of the Civil Procedure Code. The learned judges in the Court of King's Bench seem to have thought that the language of the sections contained in this chapter was insufficient to authorize the amendment sought by the appellants. But it was not denied by learned counsel for the respondents at their Lordships' bar, that the power was sufficient for the purpose, and it was argued only that it was a discretionary power and their Lordships should not overrule the discretion exercised by the Court below. In the opinion of their Lordships, the powers of amendment given by the code are full and ample and the Court had power under section 516 to give leave to amend the summons or declarations in any [illegible] the Court might think proper. Indeed, it may be doubted whether the defect in the present case was really more than an [illegible] of form, which might have been cured by amendment [illegible] judge *mero motu* under section 518. The substance of the action was to recover a debt alleged to be due to the company in [illegible] which the liquidators were the only proper persons to receive and give a discharge for. No defence was available against the company which was not equally available against the liquidators, and the co-parties were content to fight the case out with the liquidators, who were their real opponents, and the case was in fact fought out with the liquidators without any exception to their right to sue, and was ripe for judgment. It is impossible to say that the proposed amendments changes the nature of the demand, or can in any way cause a prejudice to the respondents. In short, the liquidators are *domini litis* and it was not improper to make them plaintiffs, but they ought to have joined with themselves the company; or, in other words, the liquidators had the right to sue, but sued in the wrong form. It would seem, therefore, that art. 521 of the Code is applicable to the case. Their Lordships would always hesitate before interfering with the exercise of a discretion by the Court below, but in the present case the learned judges seems to have proceeded on an erroneous construction of the Code. Their Lordships will only add that their decision will not be a precedent for substituting one plaintiff for another in another circumstance, and no such injustice as the Chief Justice apprehended need be feared. All they decide is

that the proposed amendment could, and in the particular circumstances of this case ought, to have been allowed in the sound exercise of a judicial discretion.

OVERDRAFT.

LONDON CHARTERED BANK OF AUSTRALIA v. MCMILLAN[1]

19. By an arrangement made between the Colonial Government and the appellant bank, the Registrar-General deposited daily in the bank to the credit of an account in his own name the amount of the fees, etc., received by him and drew a cheque every week for the aggregate amount of such deposits, which was paid into the Treasury. By the fraud of the clerk employed to pay in the money, the Registrar-General was led to overdraw his account to a large amount.

20. It was held that the Government having given no authority to overdraw the account, and the bank having no reason to suppose that such authority had been given and such overdraft being entirely outside the scope and object of the dealings of the parties, the Government could not be made liable for such overdraft.

PAYMENT OF FRAUDULENT CHEQUE.

IMPERIAL BANK OF CANADA v. BANK OF HAMILTON.[2]

21. A cheque for $5 certified by the respondent bank's stamp was fraudulently altered to $500 and paid by the respondent to the appellant, a holder for value, under a mistake of fact, which was not discovered till the next day.

22. In an action by the respondent to recover back $495 from the appellant: It was held (1) that the respondent was at liberty to prove, as between itself and an innocent holder for value, that the cheque had been fraudulently altered after it had been certified.

23. (2) No negligence was imputable to the respondent in cashing the cheque, without examining the drawer's account; and even if it were, it did not induce the appellant to treat the cheque as good.

1 New South Wales, aff., 2nd April, 1892, 66 L.T.R. [illegible], 61 L.J.R., n.s., 44; 8 T.L.Rep. 473.

2 Supreme Court of Ontario, aff. 13th November, [illegible] L.R. 1903, App. Cas., 49, [illegible] L.T.R. 457, 72 L.J.R. n.s., 1; 51 W.Rep. 289; 19 T.L.Rep., 56.

24. (4) Notice of forgery was unnecessary, and the cheque for $5 was not dishonored; and, accordingly, the stringent rule laid down in *Cocks* v. *Masterman*[1] to the effect that notice of dishonour of a bill of exchange must be given on the due date, does not apply. The rule will not be extented to the other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by delay.

LORD LINDLEY, page 56:—But means of knowledge and actual knowledge are not the same; and it was long ago decided in *Kelly* v. *Solari*[2] that money honestly paid by mistake of facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since, and their Lordships consider it applicable to the present case.

Page 56:—There remains the third ground, which is based upon a supposed hard and fast rule referred to by Armour, C.J., who said:—

"In my opinion this case is governed by the rule laid down in *Cocks* v. *Masterman*, where it is said, 'But we are all of opinion that the holder of a bill is entitled to know on the day when it becomes due whether it is an honoured or dishonoured bill, and that if he receives the money and is suffered to retaining it during the whole of that day the parties who paid it cannot recover it back.'

"This rule, rigorous though it may be, has been adhered to in England ever since: see *Mather* v. *Lord Maidstone*[3]; *Durrant* v. *Ecclesial Commissioners*,[4]; *Leeds Bank* v. *Walker*[5] *London and River Plate Bank* v. *Bank of Liverpool*[6] *Rules on Bills, 16th ed. 353.*

"The application of this rule does not at all depend upon whether the holder of the bill is or is not in fact prejudiced by the delay, for the conclusion in law is that he may be prejudiced, and this is the reason of the rule."

See BLANK CHEQUE, AND FORGED CHEQUE, ABOVE

1 1829, 9 B & C, 902; 33 R R., 365
2 9 M & W 78
3 186 B 277
4 6 Q. B. D 234
1883, 11 Q B D, 84
6 1896, 1 Q B

TRANSFER OF DEPOSIT.

BANK OF NEW SOUTH WALES v. GOULBURN VALLEY BUTTER COMPANY[1]

25. In an action by the company to recover from its bankers moneys which, standing to the credit of its account, had been transferred by cheques of its managing director to the credit of his own overdrawn private account with the same bankers

26. This bank, acting [illegible] and faith, and without notice of any irregularity, was not [illegible] and before honouring the cheques to inquire into the state [illegible] account between the company and its managing director.

LORD DAVEY, page 550:—The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque, *Gray v. Johnston*,[2] *Thompson v. Clydesdale Bank*,[3] and is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons: *Union Bank of Australia v. Murray-Aynsley*.[4] On the other hand, a banker is not justified of his own motion in transferring a balance from what he knows to be a trust account: *Ex parte Kingston in re Gross*.[5] Their Lordships are of opinion that Earle was not bound to inquire as to the state of the account between the parties. He had no materials to enable him to do so and it is difficult to suggest any one of whom he could have made inquiry other than Ballantyne himself. Their Lordships, therefore, hold that the bank is not affected with notice of any irregularity on Ballantyne's part.

TRUST ACCOUNT.

UNION BANK OF AUSTRALIA v. MURRAY AYNSLEY CO.[6]

27. Where a company received from the respondents trust moneys paid them to the credit of a separate account between it and the appellant bank, and failed:

28. In an action by the respondents, that as the bank was not shewn to have received the moneys as trust funds, or to have

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1 Victoria, rev., 9th July, 1902, L. R., 1902, App. Cas., 543; 87 L. T. R., ns., 71 L. J. R., ns., 112; 51 W. Rep., 367; 18 T. L. Rep., 735

2 L. R., 3 H. L., 1

3 1893, App. Cas. 282

4 1898, App. Cas. 693.

5 L. R., 6 Ch. 632

6 New Zealand, rev., 22nd June, 1898, L. R., 1898, App. Cas. 692, 67 L. J. R., ns., 123

received during the currency of the account notice to their trust character, the bank was entitled to set them off against the company in liquidation.

See LEGISLATION: *Ed. vis.*

BILLS OF EXCHANGE

CHEQUES.

CAPITAL AND COUNTIES BANK v. GORDON[1]

1. Bankers are protected by sect. 82 of the Bills of Exchange Act, 1882, only where they receive payment of a crossed cheque as agents for collection for a customer. They are not so protected when they receive payment as holders of the cheques in their own account.

2. The appellant banks credited a customer with the amount of cheques as soon as they were handed in to his account, and allowed him to draw against the amounts so credited before the cheques were cleared:

3. It was held that they were not protected by sect. 82. The protection given by sect. 82 applies only to cheques crossed before they are received by the banker.

4. A bankers' draft payable to order in demand addressed by one branch of a bank to another branch of the same bank and not crossed is not a cheque within the meaning of ss. 60, 82 of the Bills of Exchange Act, 1882, nor it is within sect. 17 of the Revenue Act, 1883. But it is within sect. 19 of the Stamp Act, 1853, which protects bankers *bona fide* paying such drafts to holders claiming under forged indorsements.

LORD MACNAGHTEN, page 245:—But the protection conferred by s. 82 is conferred only on a banker who receives payment for a customer—that is, who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents they are not within the protection of the section. It is well settled that if a banker before collection credits a customer with the face value of a cheque paid in to his account the banker becomes holder for value of the cheque. It is impossible, I think, to say that a banker is merely receing payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value.

So long as a bank has for its customers only persons of position with whose circumstances the manager is fully acquainted, as is not infrequently the case in country districts, where one bank by arrangement with its competitors has a monopoly, it matters little

[1] Aff. 11th May, 1903, L.R. 1903 App. Cas. 240

whether the bank at once credits a customer with the face value of cheques paid into his account or waits until collection. The bank only looks to its own customers. But Parliament may have thought that in the increase of banking business likely to arise in consequence of the legislation with respect to crossed cheques, and the competition sure to follow, it would not be improbable that small accounts might be opened with banks by persons of little or no credit, and that it might be a dangerous thing to extend protection to bankers dealing in crossed cheques in all cases, whether they acted simply as agents for collection or in a different character. Or possibly at the time bankers asked for no further protection than that which s. 82 purports to confer. However, that may be your Lordships have only to constitute the language of the other sections of the Act bearing on the point.

RIGHTS OF ENDORSER.

AGA AHMED ISPAHANY v. CRISP[1]

5. The endorser of a promissory note who pays the holder of it is entitled to the benefit of the securities given by the acceptor, which the holder has in his hand, at the time of the payment and upon which he has no claim except for the bill itself.

See PRINCIPAL AND AGENT: *Powers of [illegible].*

BOND.

CONSTRUCTION.

AUSTRALIAN JOINT STOCK BANK v. BAILEY.[2]

1. A recital in a bond not plainly inconsistent with its condition, will not control or limit its operation and where the recital referring to a previous guarantee, states the desire of the principal debtor to obtain advanves in addition to the sum covered by the guarantee, but the condition is to pay all the sums due by the principal debtor to the obligee, the amount covered by the bond is the whole sum due without deduction of the moneys secured by the guarantee.

BOTTOMRY AND RESPONDENTIA.

AVERAGE BOND.

WAVERTREE SAILING SHIP CO. v. LOVE.[3]

1. Where by an average bond executed at the port of discharge, consignees of cargo undertook to furnish to the shipowners a correct account and particulars of the value of the goods delivered, in order that the amount of average contri-

1 Rangoon, rev., 5th November 1891, 8 [illegible] L. Rep., 132
2 New South Wales, rev., 18th May, 1899, 68 L. J. R. n.s., 95
3 New South Wales, rev., 26th May, 1897, L. R. 1897, App. Cas. 373

bution to which they were liable might be ascertained and ajusted "in usual manner";

2. These words did not imply, as a condition of the obligation, that the shipowners should employ an average stater at the port of discharge.

3. A shipowner may take out his own average statement, and is not bound to employ an average stater either at the port of discharge or elsewhere.

LORD HERSCHELL, page 180. The profession or calling of an average stater, or average adjuster, as it is sometimes called, is of comparatively modern origin. The right to receive and the obligation to make general average contribution existed long before any class of persons devoted themselves as their calling to the preparation of average statements. It was formerly, according to Lord Tenterden, the practice to employ an insurance broker for the purpose. The shipowner was not bound to employ a member of any particular class of persons or indeed to employ any one at all. He might if he pleased make out his own average statement, and he may do the same at the present time if so minded. If he engages the services of an average stater, it is merely as a matter of business convenience on his part. The average stater is not engaged, nor does he act on behalf on any of the other parties concerned, nor does his statement bind them. It is put forward by the shipowners as representing his view of the general average rights and obligations, but the statement or ajustment is open to question in every particular by any of the parties who may be called on to contribute. The average bond entered into in the present no doubt contemplated that an average stater would be employed, and if not so employed the shipowner could have derived no benefit from the provisions which enable the trustees if they think fit to make advances out of the moneys deposited, and ultimately to distribute them in accordance with the average statement. But the bond imposes no obligation to employ an average stater, and it expressly provides that nothing therein contained should constitute the average adjuster who might be employed as arbitrator or its adjustments or statement as final settlement between the parties to the bond. It is difficult to see, then, whence an obligation on the part of the shipowner to have an average statement prepared by an average adjuster residing at Sydney, can be derived, or what right the other parties liable to make general average contribution can have to dictate that the shipowner shall employ an average stater residing at a particular place, any more than they have to designate the particular person to be employed. It is true at most ports where adventures terminate or the interests divide, and no doubt at Sydney, professional average staters of competent skill are to be found, but this is not universally the case. And it is quite conceivable that the shipowner

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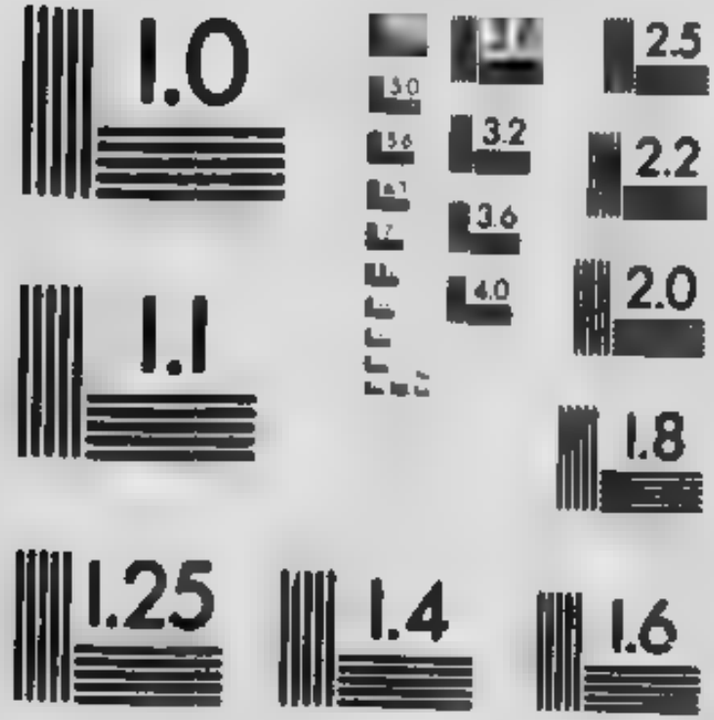

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might not be willing to entrust the preparation of the statement to any of the very limited number of average staters who might be found at some of the smaller ports. The most convenient course would doubtless be, in many, perhaps in the majority of cases, to put the matter in the hands of an average adjuster practising his calling at the port of discharge, but this would not always be so. Many cases may, however, be suggested where it would be to the advantage of all parties that the services of an average stater elsewhere should be engaged.

The learned judges in the Court below rested their judgment mainly on the law laid down by Lord Tenterden in the case of *Simonds* v. *White*[1]: "The shipper of goods," said the learned judge, "tacitly, if not expressly, assents to general average as a known maritime usage which may, according to events of the voyage, be either beneficial or disadvantageous. And by assenting to general average he must be understood to assent also to its adjustment at the usual and the proper place: and to all this it seems to us to be only an obvious consequence to add that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made." The words relied on are that the shippers must be understood to assent to the adjustment of general average "at the usual and proper place." In their Lordship's opinion, however, these words do not refer to the preparation to an average statement, but to the actual settlement and adjustment of the general average contributions. The preparation of a general average statement which not bind the shipper is not "the adjustment" of general average. In order to understand Lord Tenterden's language it is necessary to bear in mind what would happen if all parties stood on their rights. The shipowner would hold the goods until he obtained the general average contribution to which they were subject. If the owner of the goods disputed his claim, he would appeal to the tribunals of the country to obtain possession of them on payment of what was due. These tribunals would have to determine whether the owner of the goods was entitled to them and what payment he must make to release them. It would naturally follow, as Lord Tenterden said, that the parties must be understood as consenting to the adjustment according to the law there administered. But all this has, in their Lordships' opinion, nothing to do with the mere employment by the shipowner of an average adjuster to prepare a statement on his behalf. In Lord Tentendem's time, professional average adjusters were not as commonly to be found in the different ports of discharge as they are at present.

BROKERS.

See EVIDENCE: STOCK TRANSACTIONS; GAMBLING: *eodem verbis.*

BUILDERS.

See PRIVILEGE: *Builder's Privilege.*

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1 2 B. & C., 805.

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CHAMPERTY.

AGREEMENT IN LEASE.

BULLI COAL MINING CO. v. OSBORNE.[1]

1. An agreement between the respondents and their lessee, under a lease executed before discovery of the trespass, by which the former were indemnified against costs of suit on terms of paying to their lessee 92½ per cent. of the amount recovered was not champertous.

CHARTER PARTY.

See AFFREIGHTMENT: *Charter-party. Exceptions in Charter-party.*

CHEQUES.

See BANK AND BANKING: *End. ro., Blank cheques. Forged cheques, Payment of fraudulent cheque. Presentation of cheque for payment*; BILL OF EXCHANGE: *End. ro.*

CHILDREN.

CUSTODY OF.

See HUSBAND AND WIFE: *End ris.*

CLUB.

LIABILITY OF MEMBERS.

WISE v. PERPETUAL TRUSTEE COMPANY.[2]

1. In the absence of any express rule, the members of an ordinary club are not personally liable to indemnify the trustees of the club against liabilities incurred by them as such trustees.

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1 New South Wales, aff., 11th March, 1899, L. R., 1899, App. Cas., 351.

2 New South Wales, rev., 13th December, 1902, 87 L. T. R., 569; 72 L. J. R., n.s., 31; 51 W. Rep., 241; 19 T. L. Rep. 125.

COLLISION.

DELAY IN COMPLYING TO RULES OF NAVIGATION.

THE "NGAPOOTOS."[1]

1. Instantaneous compliance with article 18 of the Regulations for Preventing Collisions at Sea, by which "every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary," is not necessary; a man for the exercise of his judgment must be allowed a short, but a very short time.

LORD MORRIS, page 89:—Their Lordships concur in the principle laid down by Mr. Justice Butt in the case of *The Emmy House*,[2] namely, that compliance with article 18 at the very moment when danger becomes apparent is not necessary, for a man must have time to consider whether he should reverse or not. The Court is not bound to hold that a man should exercise his judgment instantaneously; a short, but a very short time must be allowed him for this purpose. Mr. Justice Law considered the distance was less than half a mile, and [illegible] t, consequently, the interval of time was less than a minute a[illegible] half, and was within a minute. The case, therefore, turns on seconds of time. Their Lordships have been advised by their assessors, and are of opinion that, under the circumstances, Captain Cobb rightly manœuvred. The period within which the engines could be stopped after an order given to stop would be twenty to thirty seconds, and, as they had been stopped and reversed, the delay alleged as a fault could not have been more than a few seconds. This delay, their Lordships are of opinion, was not a faulty delay, the time being occupied in giving proper directions.

DEMURRAGE.

THE "CITY OF PEKIN" v. COMPAGNIE DES MANAGERIES MARITIMES, ET AL.[3]

2. Where, as the result of a collision a vessel was detained in port, while a substituted vessel, belonging to the same owners, was doing her work at the defendants' expenses, claim for demurrage disallowed.

3. There must be actual loss, and reasonable proof thereof, to support a claim for indemnity for consequential loss.

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1 Straits Settlement, aff., 22nd May, 1897, 66 L. J. R., n.s., 88; 13 T. L. Rep., 421.

2 53 L. J. R., n.s., 43; 9 P. D., 81.

3 Hong Kong, rev., 12th July, 1900, 39 W. Rep., 176.

SIR BARNES PEACOCK, page 178: There is no doubt as to the rule of law according to which compensation is to be assessed in cases of this nature, where a partial loss is sustained by collision. The rule is *restitutio in integrum*, *The Black Prince*.[1] The party injured is not entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered. It does not follow as a matter of necessity that anything is due for detention of a vessel whilst under repair. In order to entitle a party to be indemnified for what is termed in the Admiralty Court a consequential loss resulting from the detention of his vessel, two things are absolutely necessary: actual loss, and reasonable proof of the AMOUNT: *The Clarence*,[2] *The* [illegible] *in*

PARTIES IN FAULT.

THE "UTOPIA"[3]

4. Where the harbour authority of the port of G. undertook and pay for the lighting of a sunken wreck of which her owner continued in possession and eventually raised, and in consequence of the lighting being insufficient another vessel collided with the wreck, her owners were held not liable for the collision, the control and management of the lighting of the wreck having been undertaken by the harbour authority and the owners having been guilty of no negligence.

5. In the circumstances no maritime lien attached to the wreck so as to render it liable to make good the damage done to the other ship.

6. The colliding ship having been navigated in circumstances of instant peril with reasonable care and skill: held that it was not answerable for the collision.

SIR FRANCIS JEUNE, page 19:—Their Lordships think that the law applicable to this case may be gathered from three authorities which their Lordships do not regard as being in conflict. The first of these cases is that of *Brown v. Mallet*,[5] which was decided on demurrer, and in which the question being whether in the absence of an allegation that the possession and control of a vessel, after she had foundered, was in the defendants, an obligation to protect other vessels against injury was imposed on them. That question was answered in the negative. It is to be observed that

1 1 Lush., 573
2 57 L. J. T. 43; 9 T. O. 81.
3 3 Wm. Rob., 283.
4 Gibraltar, rev., 24th June, 1893, 70 L.J.R., 47; 9 T.L.R., 542; 62 L.J.R., n.s., 118
5 5 C.B., 599.

what was laid down was, and was [illegible] reasonable skill and [illegible] to the possession [illegible] define exactly what [illegible] throw light on [illegible] circumstances such as those of this case. [illegible] *Crisp*[1] also decided [illegible] of the vessel, and that [illegible] the time of the happening of the injury, possession, control, management and direction of the vessel. It was held that they were liable. But the Court in giving judgment [illegible] their understanding of the allegation that the defendants had and exercised possession, control, management and direction of the vessel to be that "the defendants had in their power, by due care and exertion, to have altogether removed this vessel, or to have shifted at least its position, and so might reasonably have been able to have prevented the injury," and added that "if these words do not mean this, we think there was no liability on the part of the defendants." It is clear, therefore, from this case that the extent to which the owners have properly parted with the control and management of their liability ceases. The case of the *Douglas*,[2] decided in the Court of Appeal, is very similar to the present. There the steamship *Douglass* was, by the fault of those on board of her, sunk in the Thames. The vessel was never abandoned, but the master and mate took steps to inform the harbour master, and the mate was told that the harbour master undertook to light the wreck. The steamship *Mary Nixon* collided with the *Douglass* six hours after she sank, and it appears to have been assumed, and, indeed, would seem clear (although it was suggested before their Lordships that there was no negligence in anyone), that the harbour master might have taken but did not take steps to light the wreck. It was held by Sir Robert Philimore, on the authority of *White* v. *Crisp*, and *Brown* v. *Mallet*,[3] that the possession, management and control of the *Douglass* was not abandoned by his master and crew, and that the owners were therefore liable.

On appeal this decision was reversed on the ground that inasmuch as notice was given to the harbour master, the defendants were not guilty of negligence. It may be observed also that the opinion of Cotton, L.J., the defendant had, in fact, for the time abandoned the control of the wreck.

SIR FRANCIS JEUNE, page 50:—*After having examined and discussed the following causes: Stead Engine Company* v. *Hub-*

1 210 Ex., 212
2 47 L. T. R. [illegible] 702
3 5 C. B., 599

bard[1]; *Hart* v. *Conn* [illegible] *Bass* v. *Bass* [illegible] *Wells* v. *Snydan*[4]; *Attrell* v. *Hunt* [illegible]. The result of these authorities may be thus expressed. The owner of a ship sunk, whether by his default or not [illegible] second [illegible] to different considerations [illegible] possession and control of her, any [illegible] to protect other vessels from coming into collision with her. It is equally true that so long as, and so [illegible] possession, management and control of the wreck be not abandoned or properly transferred, there remains on the owner an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shewn: first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them—that is to say, has not been abandoned or legitimately transferred; and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect.

WILSON, SONS & CO. v. CURRIE.[6]

7. The steamships "Thorso" and "Otto" were approaching each other, generally speaking, on opposite courses in daylight in a narrow channel. In a manœuvre by the "Thorso" to pass another vessel, the "Thorso" and "Otto" became nearly end on. When about a mile apart, the "Thorso" signalled that she was going to starboard, and at the same time put her helm to port to pass the "Otto" on the port side. This brought her head nearly a point to starboard. The "Otto" heard, but kept a steady course. Two minutes or so otherwise, when the ships were within half a mile, the "Thorso" repeated the signal and again ported her helm. The "Otto" immediately afterwards starboarded her helm, winging her head to port, and went across the bows of the "Thorso." The "Thorso" immediately stopped and reversed, but she ran into and sank the "Otto." The owners of the "Otto" while admitting that their vessel had been in fault alleged fault also against the "Thorso" in not stopping and reversing at an earlier period.

8. *Held*, that no fault was attributable to the "Thorso."

1 101 U. S. (11 Otto), 188
2 100 U. S. (2 Davis), 371
3 25 N. S. J. (8 Tiffany), 412
4 64 N. S. J., 173
5 7 Maryland, 191
6 Aff., 13th March, 1894, L. R., 1894, App. Cas., 116

THE "NORD KAP" v. THE "SANDHILL."[1]

9. Where two steamships entered the Bosphorus from the Black Sea at the same time, both making at about an equal speed for a point on Asiatic side, on reaching that point the respondent being on the European side crossed the bows of the appellant, notwithstanding the proximity of the land, the set of the current, and the fact that neither vessel had on it at the time much steerage way.

10. Held, that the Court below was wrong in pronouncing the appellant solely to blame for the collision. The respondent was to blame in the first instance, but the appellant was also in fault for not having reversed at once when the respondent's object was or ought to have been apparent.

"MAM" TUG CO. v. BRITISH STEAM NAVIGATION CO. "TI MANNACHY."[2]

11. When a vessel under way comes into collision with a vessel at anchor, exhibiting a proper log, the onus is on her to justify her conduct. She cannot be excused, if it is shown that she had not sufficient lookout.

12. The vessel at anchor is also bound to keep a competent person on watch, whose duty it is to see that the anchor light or lights are properly exhibited, and to do everything in his power to avert or to minimize a collision.

13. If that person acts in error of judgment, when placed by the colliding vessel in a position of difficulty calling for instant decision, he is entitled to favourable consideration, and it must be shown that any alternative course would have prevented or mitigated the collision.

SIR FRANCIS JEUNE, page 356:—Their Lordships entertain no doubt that in the case of a vessel at anchor, there is an obligation to keep a competent person on watch, and that it is his duty not only to see that the anchor light or lights are properly exhibited, but also to do everything in his power to avert or to minimize a collision. Many such things may no doubt be done, and it is necessary also to be prepared to summon aid for any needful purpose.

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1 Constantinople, rev., 28th July, 1894, L. R., 1894, App. Cas., J., 646
2 Rangoon, rev., 20th March, 1897, L. R., 1897, App. Cas., 351; 66 L. J. R., n.s., 92.

Owners of SS. "[illegible]" v. Owners of SS. "[illegible]."[1]

14. [illegible] ... without alteration.

Owners of the Norwegian Steamship "Normandie" v. Owners of the British Steamship "Pekin." The "Pekin."[2]

15. Article 22 of the Regulations for Preventing Collisions at Sea, 1884, which prescribes that in certain circumstances a vessel must keep her course, may have a different meaning when applied to vessels navigating rivers to that which it bears in the case of vessels in the open sea.

16. Two vessels may be approaching one another at such a distance and on such bearings that if, in the open sea, they would be vessels crossing so as to involve risk of collision, when they are navigating a river there may be no such risk.

17. Vessels must follow, and must be known to intend to follow, the curves of the river bank, and they are not so crossing if the course which is reasonably to be attributed to either vessel will keep her clear of the other.

18. A steamship which was on the starboard bow of another steamship in a winding river was held not to blame for a collision between them, although she ported her helm, upon the ground that, in porting, she was pursuing the course which should have been attributed to her, inasmuch as it was necessary for her to do so in order to arrive at that side of the channel which was on her starboard hand.

Sir Francis Jeune, page 441:—The crossing referred to in art. 16 is "Crossing so as to involve risk of collision," and it is obvious that while two vessels in certain positions and at certain distances in regard to each other, in the open sea may be crossing so as to involve risk of collision, it would be completely mistaken to take the same view of two vessels in the same positions and

1 [illegible] Court, 27th July, 1901, L. R., 1901, App. Cas., 597; 85 L. T. R. [illegible], 70 L. J. R., n.s., 121.

2 China and Japan, aff., 3rd July, 1897, 13 T. L. Rep., 487. 7[illegible] T. L. R., 553.

distances in the reaches of a winding river. The reason, of course, is that [illegible] known to intend to follow the [illegible] But [illegible] be crossing vessels within art. 16 in a river; it depends on their presumable courses. [illegible] keeping the courses [illegible] to the [illegible] point, [illegible] the same moment, the [illegible] vessels crossing so as to involve risk of collision; but they are not so crossing if the course which reasonably to be attributed to either vessel would keep he clear of the other. The question, [illegible] always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment.

SS. "ALBANO" v. ALLAN LINE STEAMSHIP COMPANY AND UNION DAMPFSCHIFFS RHEDEREI ACTIENGESSELL SCHAFT v. SS. "PARISIAN."[1]

19. When two vessels were approaching each other in Canadian waters on courses which converged at a point outside a harbour where each vessel expected to pick up a pilot:—

20. It was held that, as they were so doing on courses and at speeds which would probably bring them to that point so as to present a danger of collision when they reached it, they were vessels crossing so as to involve risk of collision within the meaning of arts. 19, 22 and 23 of the Regulations of 1897, which had been substituted for those contained in Canadian R.S. c. 79.

21. That consequently it was the duty, negligently disregarded, of the respondent's vessel, which had the appellant's vessel on her own starboard side, to keep out of her way, there being no special circumstances within the meaning of art. 27 to authorize a departure from that rule.

22. And also, that the appellants' vessel was not to blame under art. 21. It was not shown that with reasonable care she ought to have taken action thereunder earlier than she did.

SIR GARELL BARNES, page 204:—The late Lord St. Helier, in delivering the judgment of this Board in the case of *The P kin*,[2] though dealing with a collision in a river, used language which may be regarded as not inappropriate in this case. In one passage

1 Supr. C. Canada, rev., 27th Feb. [illegible] 1907, L. R. 1907, App. Cas. 193; 23 T. L. R. 241; 96 L. T. R. [illegible]; 76 L. J. R., n.s., 33.
2 1897, App. Cas., 532, 536.

[illegible]

[illegible] Therefore, [illegible] speed up to some point, to determine, and some [illegible] latitude [illegible] to be allowed to the master in [illegible]

COLONIAL LAWS.

EFFECT OF VALIDITY ACT FOR COLONIES 28-29 Vict. c. 63.

REGINA v. MARAIS.[1]

1. The obvious meaning of the Colonial Laws Validity Act (28 and 29 Vict. c. 63) is to preserve to the Imperial Parliament a right to legislate for a colony to which a local legislature has been assigned, or to forbid the local legislature to enact anything repugnant to Imperial Legislation so effected, but not otherwise to derogate from the general powers of Colonial legislatures.

[illegible] Colonial Laws Validity Act (28 and 29 Vict. c. 63) [illegible] considerations which he has [illegible] which this Act was intended [illegible]

[illegible] of 1865 [illegible] England [illegible] as this, [illegible] which

1 Natal [illegible] July 1901, L. R., 1902, App. Cas., 51.

now qualifies these words into the consideration of what has been enacted here; that what was repugnant to the laws of England within the meaning of those words was to be a repugnancy such as is repugnant to the provisions of some such Act of Parliament or regulation "as aforesaid"; and is again qualified in this way: "In construing this Act, an Act of Parliament or any provision thereof shall be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament." The obvious purpose and meaning of that statute was to preserve the right of the Imperial Legislature to legislate even for the colony, although a local legislature had been given, and to make it impossible, when an Imperial Statute had been passed expressly for the purpose of governing that colony, for the colonial legislature in that sense to enact anything repugnant to an express law applied to that colony by the Imperial Legislature itself. That is the meaning of these words.

As to the other argument with reference to legislation by a Colony which in some respects shall run counter to, or be repugnant to, some law of the United Kingdom, that, [illegible] in the wide sense Lord Coleridge suggested, [illegible] with the rights of any British subject by the local legislature which [illegible] not in some way or another [illegible] in this country which is enacted for a different purpose, having no special reference to the circumstances of a [illegible] colony. This statute reconciles the two principles of giving local legislation, but, nevertheless, leaving still open to the Imperial Legislature by express legislative [illegible] the power to do something in the colony. So much for the [illegible] urged by Lord Coleridge.

CONTEMPT OF COURT.

INNOCENT PUBLICATION OF SCANDILISING PAPERS.

McLeod v. St. Aubyn.[1]

1. Committal for contempt of court is to be used only with reference to the administration of justice, not for the vindication of the judge as a person.

2. The publication of scandalous matter may amount to contempt of court.

3. There was no duty on the appellant to make himself acquainted with the contents of the paper before parting with it, and he was not guilty of contempt of court.

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1 St. Vincent, rev., 22nd July, 1899, 81 L. T. R., 158; 68 L. J. R., n.s., 137; 48 W. Rep., 173; 75 T. L. Rep., 487

LORD MORRIS, page 161:—Commitals for contempt of court are ordinarily in cases where some contempt *in facie* of the court has been committed, or for comments on cases pending in the courts. However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself. Lord Hardwicke, L.C., so lays down without doubt in the case of *Champlain & St. James' Evening Post*.[1] He says, "one kind of contempt of court is scandalizing the court itself." The power summarily to commit for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judges as persons. He must resort to action for libel or other proceedings. Committal for contempt of court is a weapon to be used sparingly and always with reference to the administration of justice. Hence when a trial has taken place and the case is over, the judge or the jury are given over to criticism. It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of court by scandalizing the court itself have become obsolete in this country. Courts are satisfied to leave the public opinion attacks or comments derogatory or scandalous to them. But it must be considered that, in small colonies consisting principally of coloured population, the enforcement in proper cases of commitals for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of, and respect for the court.

LETTERS TO NEWSPAPERS.

RE MOSELEY.[2]

5. The Chief Justice of a colony wrote two letters to a newspaper in which he discussed questions affecting the sanitary condition of the town. An anonymous letter was published commenting in sarcastic language on the letters.

5. The letter in question not being calculated to obstruct or interfere with the course of justice or the due administration of the law did not amount to a contempt of court;

6. And the editor was not guilty of contempt in refusing to give up the name of the writer of the manuscript.

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1 2 Atk., 471

2 Bahama Islands, rev., 2nd February, 1893. 68 L. T. R., n.s., 105. 17 L. J. R., 79.

LIBEL ON THE JUDGES.

RE SARBADHICARY.[1]

7. A High Court of Judicature established in India by letters patent had power "to approve, admit, and enrol such advocates as to the said High Court shall seem meet," and, further, "to remove or to suspend practice on reasonable cause the said advocates."

8. It was held that the Court had power to suspend from practice a member of the English Bar who had been admitted as an advocate of the court; and that the fact that an advocate had written and published, in a periodical of which he was editor, an article which was a libel reflecting on the judges of the High Court in their official capacity, though professing to be a vindication of his own professional conduct, amounted to a contempt of court which was a reasonable cause for suspending him from practice.

NATURE OF THE OFFENSE.

IN THE MATTER OF A SPECIAL REFERENCE FROM THE BAHAMA ISLANDS.[2]

9. Where a letter published in a colonial newspaper contained criticisms, on the conduct of the Chief Justice of the colony, of such a nature that it might have been made the subject of proceedings for libel, but was not in the circumstances calculated to obstruct or interfere with the course of Justice or the due administration of the law: -

10. Held, that the same did not constitute a contempt of Court.

11. It appearing that the editor had, on notice from the Court, refused to discover the name of the writer, and had thereupon been sentenced to fine and imprisonment during pleasure for the publication and to fine and imprisonment for the refusal, but had been released by order of the Governor:—

12. Held, that the Chief Justice had no legal authority to require either the name of the writer or the manuscript of the letter:

13. There may not be imported into a case of this kind any

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1 Allahabad, aff., 14th December, 1906, 95 L. T. Rep., 894: 23 L. T R. 180

2 Bahama Islands, 15th December, 1892, L. R., 1893, App. Cas., 138.

matter which was not in evidence against the defendant, nor will their Lord-ships permit any such matter to be laid before them.

CONSPIRACY.

See CRIMINAL LAW: *Eod ro.*

CONTRACT.

AMBIGUOUS PROPOSAL.

BLACK v. WILLIAMS.[1]

1. Where words in a proposal for a contract are understood and acted upon by the parties in different senses, there is no contract; and it is for the plaintiff, in an action for breach of contract, to show that his construction is the true one. It is not for the Court to determine the true construction.

ACQUIESCENCE.

FORMAN ET AL v. THE "LIDDASDALE."[2]

2. The fact that the owner of the chattel repaired has sold it at a price enhanced by such unauthorized labour, does not amount to acquiescence on his part or acceptance of liability for the work done.

COLLATERAL AGREEMENT.

BANK OF CHINA ET AL v. AMERICAN TRADING CO.[3]

.3 The circumstance that one of the conditions of a contract affects only part of the consideration, is not, per se, sufficient to make it collateral to the main contract, unless it appear that the condition was not intended by the parties to go to the root of the whole contract.

CONDITION PRECEDENT.

BANK OF CHINA AND JAPAN v. AMERICAN TRADING CO.[4]

4. By contract notes, bankers undertook to pay sterling to merchants in exchange for silver, at specified rates, over a period of time, with a stipulation that the merchants' goods should be "financed" through the bank.

5. This stipulation was a condition precedent to the merchants' right to the fulfilment of the exchange contract, but

1 New South Wales, aff., 9th December 1899, 69 L. J. R., n.s., 17.
2 Victoria, aff., 17th February, 1899, 69 L. J. R., n.s., 44.
3 Supr. C. of China and Japan, aff., 70 L. T. R., 849
4 China and Japan, aff., 28th April, 1894, 63 L. J. R., n.s., 92.

there was a mutual obligation to negotiate reasonable terms for "financing" the goods.

6. The bankers having refused to negotiate terms, and having wholly repudiated the contract, whether for finance of goods or for exchange.

7. It was held that the merchants were entitled to recover from them the loss they had sustained upon the exchange of their silver for sterling money.

SPURRIN v. LA CLOCHE.[1]

8. Where the parties to a contract reside in different countries in which different systems of law prevail, their intention is the true criterion to determine by what law its interpretation and effect is to be governed.

LORD LINDLEY, page 451:- Mr. Deans contended that the arbitration clause was invalid by the law of Jersey, because not only the amount payable, but also the liability to pay was decided by arbitration; and that this was an illegal attempt to oust the jurisdiction of the Court, and went further than *Scott v. Avery*.[2] But if a contract is so framed as to give no cause of action unless a certain condition is performed, no question arises as to ousting the jurisdiction of any Court. It was by not observing the difference between no cause of action, and a defence which assumes a cause of action, but is based on the incompetence of a particular to enforce it, that the Court of Exchequer went wrong in *Scott v. Avery*.[2] This oversight was pointed out and corrected in the Exchequer Chamber[3] and again in the House of Lords, Maule, J., put the matter in the true light in the Exchequer Chamber; he there said: "There is no decision which prevents two persons from agreeing that a sum of money shall be payable on a contingency; but they cannot legally agree that when it is payable no action shall be maintained for it."[4]

CONSTRUCTION Abstention from Business.

SOUTHLAND FROZEN MEAT CO. v. NELSON BROTHERS.[5]

9. The respondents made an agreement with the appellants to purchase all the output of their works for the period of three years, and, during that time, not to "erect or assist or be in

1 Jersey, rev., 14th May, 1902 L. R., 1902, App. Cas., 446.
2 H. L. C., 811
3 8 Ex. 487.
4 8 Ex. 499
5 New Zealand, aff., 8th March, 1898, 78 L. T. R., 363; 67 L. J. R., n.s., 82; L. R., 1898, App. Cas., 442.

any way concerned or interested in the erection or use of" any other similar works.

10. The words in this contract must be construed in a business sense, and the agreement was not broken by the respondents during the period of three years, (1) agreeing to purchase all the output of other works; (2) agreeing to purchase such other works after the expiration of the three years, subject to certain additions being made to them; (3) lending money to the owner of such other works, there being no evidence that it was to be spent on the works.

Agreement to Furnish All Water Required.

KIMBERLEY WATERWORKS CO. v. DE BEERS CONSOLIDATED MINES.[1]

11. An agreement whereby a mining company undertakes to obtain all the water required by them for their mining purposes from a water company, and from no other person or persons, does not authorize the mining company to obtain a gratuitous supply of water for these purposes from another source. But a proviso in the agreement that nothing in the agreement should prevent the mining company from using any water obtained from the mines or from their wells or reservoirs is not confined to mines the property of the company at the date of the agreement?

Building.

LYTTLETON TIMES' CO., LIMITED, v. WARNERS', LIMITED.[2]

12. Implied obligations in a contract must be governed by the common intention of the parties.

13. In an action by the respondents as lessees against the appellants for an injunction and damages, it appeared that both parties had agreed to a rebuilding of the appellants' printing-house on terms that the respondents were to rent from the appellants two upper floors and additional bedrooms for their adjoining hotel, and the appellants were to have on the ground floor an engine-house and printing machinery fo
tion of their business, both parties believing that the noise and

1 Cape of Good Hope, aff., 31st July, 1897, 66 L. J. R., n.s., 108.
2 New Zealand, 1907, rev., L. R., 1907, App. Cas., 476; 76 L. J., 100.

vibration which were the cause of action would be so slight that it might be disregarded:

14. Held, that in the absence of evidence that the applicants had erected the building or worked the machinery or plant improperly the action must be dismissed. Both parties contemplated that the appellants should keep on printing, and that the respondents should have reasonably quiet bedrooms, but the latter intention could not be enforced if it would frustrate the former.

15. Where a scheme has been entered into and a scheme made for carrying out two purposes which turn out to be incompatible with each other, neither party has any remedy against the other in respect of damages sustained by the execution of the scheme where nothing has been done or omitted which was not contemplated by both parties."

LORD LOREBURN, L.C., page 480:—At the start of the difficulties in the case as presented to their Lordships in argument lies the question: Ought the fact that one of the parties was the grantor and the other the grantee of a lease to dominate the decision of the case? The maxim that a grantor cannot derogate from his grant expresses the duty ordinarily laid on a man who sells or leases land. But it does not touch a similar and equally binding duty that may in certain cases be laid on a man who buys or hires land. If A lets a plot to B, he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired. So also, if B takes a plot from A, he may not act so as to frustrate the purpose for which in the contemplation of both parties the adjoining plot in A's hands was destined. The fact that one lets and the other hires does not create any presumption in favour of either in construing an expressed contract. Nor ought it to create a presumption in construing the implied obligations arising out of a contract. When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose, or what were the purposes, to which both intended the land to be put, and, having found that, that both parties should be held to all that was implied in this common intention.

In this case their Lordships think that both parties agreed upon a building scheme with the intention that the building should be used for bedrooms, and also for a printing house, according to a design agreed upon. Both parties believed that these two uses could co-exist without clashing, and that was why both of them accepted the scheme. Neither would have embarked upon it if he had not thought his intended enjoyment of the building would be permitted, and both intended that the other should enjoy the

building in the way contemplated. They were mistaken in their anticipation. But if it be true that neither has one or as to do anything which was not contemplated by both, neither can have any right against the other.

Clearing Snow From Track.

CITY OF MONTREAL v. MONTREAL STREET RAILWAY.[1]

16. The City Council of Montreal, being bound as the road authority to remove the ice and snow on the streets from curb to curb, including the snow thrown or falling from the side walks:—

17. It was held that the respondent street railway company, having contracted with the city to keep their track free from ice and snow, did not, having regard to the surrounding circumstances, and in the absence of words expressly or impliedly forbidding it, commit a nuisance by sweeping their snow into the street.

18. And that the city having granted to the company all rights and privileges necessary for the proper and efficient use of electric power to operate cars in the streets in the manner successfully in use elsewhere, the latter could not be prevented from using the electric sweepers.

LORD MACNAGHTEN, page 189:—In connection with this part of the case, an argument was advanced at the bar which does not appear to have been advanced in the Court of Quebec. It was an argument founded upon the case of *Agslon v. Aberdeen District Tramways Co.*[2] In that case it was held that a tramway company was committing a nuisance, not merely by flooding the streets with briny slush injurious to the feet of horses, but also by piling snow from its tracks in ridges or lumps upon the surface of the streets. The argument, as put forward at their Lordships' bar, seemed to be an argument drawn not so much for the principles laid down in the House of Lords as from the facts of a particular case where the surrounding circumstances were different, it by no means follows, as indeed a careful perusal of the Scottish case will shew, that what is a nuisance in Aberdeen would be a nuisance in Montreal. In Aberdeen winter is not permanent. In Montreal it is, and the inhabitants are invited, or at any rate permitted to throw the snow which is an inconvenience to them into the middle of the street. Be this as it may, if the true construction of the contract be (as their Lordships think it is) that the company is permitted by the street authority to clear the snow from its

[1] Quebec, aff., 24th June, 1903, L. R., 1903, App. Cas., 482; 89 L. T. R., 80; 19 T. L. Rep., 968.
[2] 1897, A. C., 111.

track by sweeping it into the street, there can be no room for the contention that that operation is to be treated as a nuisance.

Conditional Promise to Renew.

MONTREAL GAS COMPANY v. VASEY.[1]

19. A written promise by the appellants that, if satisfied with the respondent as a customer, they would "favourably consider" any application by him to renew a subsisting contract between them on its expiration does not impose a legal obligation to grant it.

SIR H. STRONG, page 599:—Their Lordships are unable to find in the promise made in this letter that the appellants would "favourably consider" an application to renew anything legally binding the appellants: so far from this being so, the terms used imply that the appellants reserved to themselves the right to deliberate on the question of renewing the contract if the respondent should apply to them to do so. The utmost that can be said is, that the respondent, if he proved to be satisfactory as a customer, might, as the letter assures him, expect favourable consideration. It does not require demonstration to shew that such an undertaking falls short of contract.

Contract with Government.

REGINA v. DEMERS.[2]

20. Where the respondent contracted with the Government to execute, for a term of years, the printing and binding of certain public documents, at stipulated prices, but the Government did not expressly contract to give to the respondent all or any of the said work:—

21. A stipulation to that effect could not be implied, and there was no breach of contract by reason of orders for work being withheld.

Correspondence.

LIVINGTON v. ROSS.[3]

22. In an action by the appellant for a declaration that he was entitled as purchaser to a conveyance from the respondent of the property in suit:—

23. On consideration of all its terms and of the surrounding circumstances, the agreement sued upon was not a vendor

1 Quebec, rev., 28th July, 1900, L. R., 1900, App. Cas., 595; 83 L. T. R., 233; 69 L. J. R., n.s., 134.

2 Quebec, rev., 9th December, 1899, L. R., 1900, App. Cas., 103; 81 L. T. R., 795.

3 Quebec, aff., 16th February, 1901, L. R., 1901, App. Cas., 327; 70 L. J. R., n.s., 58.

and purchaser agreement, but an agency agreement; the appellant never came under any personal liability, present or future, to purchase; the arrangement contemplated being on behalf of third parties who might thereafter be accepted by the respondent.

Damage.

PUBLIC WORK COMMISSIONERS v. HILLS.[1]

24. It was provided in the railway construction contract that in the event, which happened, of non-completion of the line within a specified period, the plaintiff contractor should forfeit to the defendant Government certain percentages which the Government retained out of moneys payable under this and two other railway contracts, as a guarantee fund to answer for defective work, and also certain security money lodged with its Agent-General "as and for liquidated damages sustained by the said Government for the non-completion of the said line"; and that it should be lawful for the Government to take possession of the incomplete line and pay the balance due in respect of its "actual cost":—

25. On its true construction the term "actual cost" was limited to the amount of the moneys expended on the work, and that interest thereon could not be added.

26. And the Government was not entitled to the retention and security moneys as liquidated damages; for the total amount thereof was indefinite and in the case of the retention moneys depended on the progress of construction, the amount of the percentages and the quantity of defective work. That could not, therefore, be treated as a genuine prestimate of loss; but the Government was entitled to obtain judgment in reconvention for such damages as it may have actually suffered through the plaintiff's breach of contract and deduct the same from the funds in question.

LORD DUNEDIN, page 375:—Their Lordships have no doubt that the case of the non-completion of a railway would be a natural and proper case in which to make such a stipulation. But the question arises in each particular case whether such a stipulation has been made, and it is well settled by law that the mere form of expression

[1] Cape of Good Hope, aff., 26th May, 1906, L. R., 1906, App. Cas. 368; 22 T. L. Rep., 589; L. T Rep., 94, 833; 75 L. J. R., n.s., 69.

"penalty," or "liquidated damages," does not conclude the matter. Indeed, the form of expression here, "forfeited as and for liquidated damages," if literally taken, may be said to be self-contradictory, the word "forfeited" being peculiarly appropriate to penalty and not to liquidated damages.

The House of Lords had occasion to review the law in the matter in the recent case of *Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda.*[1] It is perhaps worthy of remark, in view of certain observations of the learned Chief Justice in the Court below, that that was a Scotch case, that is to say, decided according to the rules of a system of law where contract law is based directly on the civil law, and where no complications in the matter of pleading had ever been introduced by the separation of common law and equity.

The general principle to be deduced from that judgment seems to be this that the criterion of whether a sum, be it called penalty or damages is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which cover the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principle obligation. The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole and must be viewed as at the time the bargain was made.

Delivering.

GEORGE & EMERY CO. v. WELLS[2]

27. In the construction of a written contract, the judge, at the trial, is justified in deciding that a breach goes to the root of the contract so as to entitle the other party to treat it as repudiated without leaving that question to the jury.

28. A contract provided that all mahogany and cedar on "the land of the respondent is to be delivered" to the appellants "for which contracts shall be made annually for the amount to be delivered." Before all the wood had been delivered the appellants committed a breach of the contract, which was held to justify the respondent in treating it as repudiated:

29. The proper construction of the contract was that though annual contracts were to be made as to the amount to be

1 1905, App. Cas., 6.
2 British Honduras, aff., 24th June, 1906, 95 L. T. Rep., 589.

delivered in each year, the appellants were bound to make arrangements for taking all the respondent's wood, and he was entitled to prospective damages for the quantity not taken.

Meaning of Words "Always."

MUSSAMMAT V. TASADDUQ.[1]

30. The words to "pay always a certain sum per month" to the named person, must be constructed according to the intentions of the parties in the agreement, but in award, contract, or will, the payments do not extend beyond the life of the person who was named.

Operations of Street Railways.

MONTREAL STREET RAILWAY V. MONTREAL CITY.[2]

31. By article 1018 of the Civil Code of Lower Canada, "all the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act."

32. The appellant company having contracted with the respondent city to pay annually certain specified percentages on the total amount of their gross earnings arising from the whole operation of their railway, and it appearing from the rest of the contract that the city considered territories of outside municipalities were not included within its scope, and that it could only deal with streets within its jurisdiction, and that the company had to make separate arrangements with outside municipalities in respect of the operation of the railway within their limits:—

33. By the true construction of the contract, the city was only entitled to percentages on the gross earnings arising from the whole operation of the lines within its own limits.

TORONTO CORPORATION V. TORONTO RAILWAY, ET CENTIA.[3]

34. By agreement of sale and purchase between the Toronto City Corporation and the Toronto Railway Company, dated

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1 India, rev., 9th March, 1901, 17 T. L. Rep., 336.

2 Supr. C., Canada, Quebec, rev., 14th November, 1905, L. R., 1906, App. Cas. 100, 93 L. T. R. 678; 22 T. L. Rep. 60; Q. J. R. 15 K. B., 174, 75 L. J. R., n.s., 9.

3 Ontario, varied, 26th April, 1907, L. R., 1907, App. Cas., 315; 96 T. L. R., 794.

September 1, 1891, and confirmed by Ontario Act 55 Vict. c. 99, the latter acquired, not merely the material of the railway undertaking in suit, but also, as was clearly provided, the exclusive right "to operate surface street railways in the city of Toronto" in the fullest possible way within the period of the agreement:

35. On its true construction, territorial additions to the city made during the term of the agreement were not within its scope.

36. By clause 14 it was provided that the company might be required to lay down new lines or extend tracks and car service as approved by the city, and by clause 17 it was provided that on the company failing so to do, the privilege so abandoned might be granted to any other person or company without any resulting claim to the purchaser for compensation.

37. Under these clauses, construed so as not to derogate from the exclusive right of the company, the sole remedy in case of non-compliance was that provided by the latter clause, and a claim for damages was not maintainable.

38. The exclusive power to operate included the right to determine the route and stopping of the different cars and their interrelations, which was not displaced by other provisions. In particular, clause 26 gave the city power to determine the speed and service necessary on each main line. But it was included amongst sections headed "track, &c., and roadways," all referring to the physical condition of those entities, and not to the course or direction of the cars, and should not be construed as intended to derogate from the company's exclusive powers.

Penalty.

JOHNSTON ET AL V. CONSUMERS' GAS COMPANY OF TORONTO.[1]

39. When powers are given to a statutory company for the supply of a commodity, the Act providing that in certain specified events the price is to be reduced, and the municipality is authorized to audit the company's annual statement and verify their accounts, an aggrieved consumer, in the absence of any pecuniary penalty for default or of the reservation of any right of action to individuals, has no right of action against the

1 Ontario, aff., 1st April, 1898, 67 L. J. R., n.s., 1, L. R., 1898, App. Cas., 447.

company for non-compliance with the provisions of the Act. To the Corporation only, in such a case, is the duty confided of seeing that the Act is obeyed.

Rescission.

NATIONAL BANK OF AUSTRALIA V. FALKINGHAM ET AL.[1]

10. When two deeds dealing with the same matter are so differently framed as to be really inconsistent, the Court will infer that it was intended by all parties that the latter should be substituted for the earlier.

To Keep Track Free From Ice.

CITY OF MONTREAL V. MONTREAL STREET RAILWAY.[2]

11. Under a contract between the appellants and the respondents, the latter were bound "under instructions from the city to keep their track free from ice and snow";—

12. The company was not bound also to remove or cause to be removed from the streets and convey elsewhere the snow which it so cleared from its tracks."

EXTRAS.

FORSAN ET AL V. THE "LIDDASDALE."[3]

13. When there is a provision that there is to be no alteration or deviation from the agreed specification or claim made for extras, without the written sanction of an agent, work so ordered must be within the scope of the agent's authority to order.

INDUCING WORKMEN TO BREACH OF CONTRACTS.

DENARY AND CADERY MAIN COLLIERIES V. YORKSHIRE MINERS' ASSOCIATION.[4]

14. Where workmen strike in breach of their contracts, those who help to maintain the strike by money and counsel are not

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1 Victoria, aff., 9th July, 1902, 87 L. T. R., 91
2 Quebec, aff., 24th June, 1903, 72 L. J. R., n.s., 119
3 Victoria, aff., 17th February, 1899, 69 L. J. R., n.s., 44
4 Aff., 14th May, 1906, L. R. 1906, App. Cas. 384

liable to pay damages to the employers, merely because losses are thereby caused to the employers.

45. A trade Union having been sued for damages on the ground that workmen had been induced to break their contracts with their employers by officials of the Union, and that the Union had ratified and adopted the acts of their officials:

46. It was held that the Union was not liable, those who procured the strike not having been authorized by the rules or by the action of the Union.

LORD DAVEY, page 400:—I do not think that inducing or attempting to induce men not to work for a particular employer, or a combination for that purpose, is a cause of action, if it be done in furtherance of what the parties in good faith believe to be their trade interest, though it may injure the employer in his business: *The Mogul Steamship Company's Case*,[1] and *Allen* v. *Flood*.[2] If this were not so, I do not very well see how any general strike would ever be maintained. On the other hand, if the combination be actuated by a malicious intention to spite and injure another without just cause, it would be actionable: *Quinn* v. *Leathem*.[3]

INTERFERENCE WITH EXECUTION.

LODDER v. SLOMEY.[4]

47. Where the appellants, having guaranteed the due performance of a contract made with a municipal Corporation for the execution of works on its land, agreed, on the contractor's default, with the respondent, to complete the execution of the works on the terms of the original contract, and in effect delegated the supervision of the contract and all incidental arrangements to the findings of the jury, improperly prevented the respondent from proceeding with the stipulated expedition and wrongfully seized the works and extruded the respondent: –

48. It was held, that the appellants, having by their conduct constituted the corporation their agents, and the delay being attributable to their acts, could not justify the seizure and re-entry: and that the respondent was entitled to treat the contract as at an end and sue on *quantum meruit*.

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1 1892, App. Cas., 25.
2 1898, App. Cas., 1.
3 1901, App. Cas., 495.
4 New Zealand, aff., 22nd June, 1904, L. R., 1904, App. Cas., 442; 91 L. T. R., 211; 73 L. J. R., n.s., 52; 52 W. Rep., 131; 20 T. L. Rep., 597.

COMMISSIONERS OF PUBLIC WORKS v. HILLS.[1]

49. The criterion of whether a sum stipulated for on the breach of a contract is "liquidated damages" with which the Court will not interfere," or a "penalty" which covers the damages, proved, but does not assess it, is to be found in whether the sum so stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. Therefore where a contract with a Colonial Government for the construction of a railway, to be paid for in instalments as the work proceeded, empowered the Government to retain 10 per cent. of the instalments (as they fell due, to be forfeited to the Government "as and for liquidated damages" in case of the non-completion of the line: it was held that the sums so retained were of the nature of a penalty, not liquidated damages.

50. The contract provided that in the event of the line not being completed the contractor should be paid "the actual cost" of the incomplete line.

51. Held also, that he was not entitled to interest on the amount.

LORD DUNEDIN, page 834:—But the question comes up in each particular case whether such a stipulation has been made, and it is well settled law that the mere form of expression "penalty," or "liquidated damages," does not conclude the matter. Indeed, the form of expression here, "forfeited as and for liquidated damages," if literally taken, may be said to be self-contradictory, the word "forfeited" being particularly appropriate to penalty and not to liquidated damages. The House of Lords had occasion to review the law in the matter in the recent case of the *Clydebank Engineering and Shipbuilding Company v. Don José Ramos Yzquierdo y Castaneda.*[2] It is perhaps worthy of remark, in view of certain observations of the learned Chief Justice in the court below, that that was a Scotch case—this is to say, decided according to the rules of a system of law where contract law is based directly on the civil law, and where no complications in the matter of pleading had ever been introduced by the separation of common law and equity. The general principle to be deduced from that judgment seems to be this—that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the court, or is truly, a penalty which

1 Cape of Good Hope, aff., 24th May 1906, 94 L. T. R., 833.
2 91 L. T. Rep., 666; 1905, App. Cas., 6.

covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. The *indicia* of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as to the time the bargain was made.

ORAL EVIDENCE.

BANK OF NEW ZEALAND v. SIMPSON.[1]

52. Words with a fixed meaning in a written contract cannot be explained by oral evidence to mean something different from what they express. Where the words used are susceptible of more than one meaning, extrinsic evidence is admissible to show what were the facts which the negotiating parties had in their minds.

53. When a written contract provided that the respondent, a railway engineer, should receive extra commission "on the estimate of 35,000*l.*, in the event of my being able to reduce the total cost of the works below 30,000*l.*":—

54. It was held that that evidence was rightly admitted to show to what items of cost the estimate related.

LORD DAVEY, page 187:—The rule is thus stated in Taylor on Evidence, 8th ed., vol. ii., s. 1194: "It may be laid down as a broad and distinct rule of law that *extrinsic evidence* of every *material fact* which will enable the Court *to ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words, *to identify the persons and things* to which the instrument refers must of necessity be received." In *Grant* v. *Grant*,[2] Blackburn, J., quoted judicially the following passage from his valuable work on Contract of Sale (page 191):—

The general rule seems to be that all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected."

Various cases may be cited in which these principles have been applied. In *Ogilvy* v. *Foljambe*,[3] Sir William Grant says: "The defendants speak of 'Mr. Ogilvie's house,' and agrees 'to give

1 New South Wales, rev., 17th February, 1900, L. R., 1900, App. Cas., 182; 48 W. Rep., 591; 16 T. L. Rep., 210

2 L. R., 5 C. P., 727, page 728

3 1817, 3 Mer., 53, 17 R. R., 13

£14,000 for *the premises,'* and parol evidence has always been admitted in such a case to shew to what house and to what premises the treaty related." In *Macdonald* v. *Longbottom*,[1] Lord Campbell says: "This was an offer made to the plaintiffs and accepted by them of 16s. per stone for 'your wool,' to be delivered in Liverpool. The only question, therefore, is, What was the subject-matter of the contract described as 'your wool'? I am of opinion that when there is a contract of the sale on a specific subject-matter, oral evidence may be received for the purpose of shewing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract. Now, Stewart, the defendant's agent, had a conversation, before the contract, with one of the plaintiffs, who stated what wool he had on his farm and what he had bought from other farms. The two together constituted 'his wool'; and, with the knowledge of these facts, the defendant contracts to buy 'your wool.' There cannot be the slightest objection to the admission of evidence of this previous conversation, which neither alters nor adds to the written contract, but merely enables us to ascertain what was the subject-matter referred to therein." And in *Smith* v. *Thompson*,[2] evidence was admitted of previous letters to shew that a sum of money transmitted by an employer to his clerk for "business purposes" was properly applied by the clerk in payment of his own salary.

Of course, if the words in question have a fixed meaning not susceptible of explanation, parol evidence is not admissible to shew that the parties meant something different from what they have said. That is not so in the present case. Their Lordships think that "the total cost of the works" may mean the cost to the owner of the completed railway, and they think that any person receiving the letter with a knowledge of the previous circular and of the conversation of the previous day according to Chapman's version (which the jury evidently believed) might and would have so understood it.

PERFORMANCE.

FORMAN ET AL. V. THE "LIDDESDALE."[3]

55. Where a contract provides for stipulated work, at a lump sum, and such work is not done, but its equivalent or better work is effected, no claim for such substituted work can be sustained.

LORD HOBHOUSE, page 49:—In the case of *Appleby* v. *Meyers*,[4] Lord Blackburn mentions two conditions under which a contractor

1 E. & B., 977.
2 8 C. B., 44.
3 Victoria, aff., 17th February, 1896, 69 L. J. R., n.s., 44.
4 36 L. J. R., n.s., 331, L. R., 2 App. Cas., 651.

for a lump sum, who has not performed the stipulated work, can recover something under the contract. He can do so if he has been prevented by the defendant from performing his work, or if a new contract has been made that he shall be paid for the work he has actually done.

SPECIFIC PERFORMANCE.

GODFREY V. CONSTABLES OF THE ISLAND OF SARK.[1]

56. There is no Court which can decree specific performance of a private contract, or administer the equities arising out of part performance, or acquiescence by a vendor in the expenditure of money by a purchaser on the faith of the contract.

ULTRA VIRES.

GREAT NORTH WEST CENTRAL RAILWAY CO. V. CHARLEBOIS ET AL.[2]

57. A judgment against a company obtained by consent upon a contract which was *ultra vires,* has no more validity than the contract upon which it is founded, but is impeachable to the same extent as the contract.

58. In such a case, the contract cannot be maintained as to matters admitted to be lawful while matters *ultra vires* are disallowed, but it must be wholly set aside.

LORD HOBHOUSE, page 36:—But the difficulty is to reconcile an opinion that a judgment obtained as this was is a binding judgment. The authorities referred to by Supreme Court do not relate to contracts *ultra vires.* It is quite clear that a company cannot do what is beyond its legal powers, by simply going into court and consenting to a decree which orders that the thing shall be done. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in court like any other disputed matter. But in this case both the parties, plaintiff or defendant in the original action and in the cross action, were equally insisting on the contract. The president, who appears to have been exercising the powers of the company, had an interest to maintain it, and took a large benefit under the judgment. And as the contract on the face of it is quite regular, and its infirmity

1 Guernsey, rev., 18th June, 1902, 87 L. T. R., 3.
2 Supr. C., Canada, rev., 1st April, 1898, 79 L. T. R., 35; 68 L. J. R., n s, 25.

depends on extraneous facts which nobody disclosed, there was no reason whatever why the court should not decree that which the parties asked to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded.

The next question is how to deal with a contract vitiated in such important respects. The courts in Ontario held that the payments *ultra vires* could be so separated from the lawful payments for construction, that it was open to them to maintain the contract while disallowing the wrongful payments. The appellants object to that course, and so do the counsel for Charlebois; both preferring that the contract should wholly set aside, and that Charlebois should be left to recover the value of his work. Not only is that the more direct and usual course, but it seems to their Lordships that to resolve the consideration for the contract into its component elements is not a simple thing, and they are not satisfied that justice is done by it.

WAGES BY MEASUREMENT.

HUMBLE v. HUMPHREYS.[1]

59. Where, in a colliery agreement, men are to "receive payment by measurement for work done by them as miners" at specified rates, the amount of wages to be paid does not depend on the quantity of mineral gotten.

WITH COLONIAL GOVERMENT.

WILLIAMS v. HOWARTH.[2]

60. Where a Colonial Government has entered into a contract with the respondent for military services in South Africa at a certain rate of pay:—

61. It did so on behalf of the Crown, and any payments made by the Crown to the respondent, through the Imperial Government for services so rendered to the Crown, were in part discharge of moneys due under the contract, and the Colonial Government was entitled to the benefit of them.

EARL OF HALSBURY, L.C., page 554:—The plaintiff was in the service of the Crown. Whether the money by which he was to be paid was to be found by the Colony or the Mother Country was not a matter which could in any way affect his relation to his employer, the Crown.

The learned Acting Chief Justice in giving his judgment in this case, said: "The King has no concern with payments for services

1 New South Wales, aff., 30th November, 1901, 71 L.J.R., n.s., 18; 18 T.L.Rep., 117

2 New South Wales, rev., 14th July, 1905, L.R., 1905, pp. Cas., 551.

rendered in this Colony; the obligation is with the Government of New South Wales," and, so far as their Lordships can understand, this is the ground upon which the judgment rests.

But with respect to the learned judge, this is entirely erroneous. The Government in relation to this contract is the King himself. The soldier is his soldier, and the supplies granted to His Majesty for the purposes of paying his soldiers, whether they be granted by the Imperial or the Colonial Legislature, are money granted to the King, and the Appropriation Act, whenever an Appropriation Act is passed, simply operates to prevent its being applied to any other purpose.

Under these circumstances the money paid was money paid for the service rendered to the King, and no other payment could possibly be due upon the contract declared on.

See CORPORATION (*Company*): *Contract before Incorporation.*

CORPORATION (*Municipal*): *Interest in Contract.*

FRAUD IN CONTRACT; INTERNATIONAL LAW: *Eodem verbo.*

MONTREAL GAS COMPANY: *Right to cut off gas.*

COPYRIGHT.

FINE ARTS.

GRAVES & CO. v. GORRIE.[1]

1. The Imperial Fine Arts Copyright Act, 1862, confers on a British representative subject and person resident in British Dominions copyright in pictures, drawings, and photographs. It extends to the whole of the United Kingdom, but does not extend to any part of the British dominions outside the United Kingdom.

2. There is nothing in the Canada Copyright Act, 1875, or in the International Copyright Acts, which conflicts with this view.

LORD LINDLEY, page 498:—The question depends entirely on the true construction and effect of the Act of 1862 before referred to. Other statutes were called in aid by the appellant's counsel

[1] Ontario App., 28th July, 1903, L. R., 1903, App. Cas. 496; 172 L. J. R. n.s., 95; 52 W. Rep., 113; 19 L. T. Rep., 652.

and will be noticed presently, but they do not extend the rights conferred by the Act of 1862.

The Act of 1862 begins the reciting (as their Lordships believe, quite accurately) that the authors of paintings, drawings and photographs had, and the law then stood, no copyright in such works, and that it was expedient to amend the law in that respect. Then follows sect. 1, which confers copyright in such works on their authors being British subjects or residents within the dominions of the Crown. Copyrights in such works and assignment of such copyrights have to be registered in Stationer's Hall; and no one is entitled to the benefit of the Act until registration (sect. 4); penalties are imposed on persons who infringe such copyright (see sects. 6, 7 and 8); facilities are given for obtaining injunctions (sect. 9); importations into the United Kingdom are prohibited (sect. 10); the remedy by action for damages is preserved (sect. 11); and the 6th International Copyright Act (7 and 8 Vict., chap. 12) is incorporated.

The Act of 1862 confers on British dominions copyright in pictures and drawings, and photographs. Such copyright extends to the whole of the United Kingdom. But there is not a word in the Act to indicate any intention on the part of the Legislature to extend the limits within which the copyright is to be enjoyed to any part of the British dominions outside the United Kingdom. There are clauses, especially sect. 4, relating to registration, and sect. 10, prohibiting importation, which negative any such intention. In the sense of language clearly shewing an intention to confer copyright in such dominions, their Lordships are of opinion that the plaintiffs' contention cannot be supported.

This view of the Act is by no means new. It was adopted in *Tuck & Sons* v. *Priester*,[1] in which the non-registration of the penal clauses had to be considered. The appellant's counsel, however, called in aid some other statutes, and notably the Canada Copyright Act, 1875 (38 and 39 Vict., chap. 53, sect. 3), and the Intercolonial Copyright Acts.

The Canada Copyright Act, 1875, does not, by sect. 3, make the Canadian Act set out in the schedule an Imperial Act applicable to Canada. The section simply removes a difficulty which had arisen in Canada by reason of sect. 91 of the British North America Act and some Orders-in-Council. Copyright is placed by that Act under the Dominion Legislature; and, having regards to some Orders-in-Council, it was doubtful by whom the Act was considered by the Court of Appeal for Ontario in *Stiles* v. *Belfor*,[2] and it is plain from that case, and, indeed, from the Act itself, that it in no way assists the plaintiffs.

The International Copyright Acts, and especially the Act of 1886 (49 and 50 Vict., chap. 33), were relied upon with the view

1 19 Q. B. D. 629.
2 Ont. App. Rep. 136.

of shewing that, unless the Act of 1862 were held to confer copyright, not only in the United Kingdom, but also in the British dominions, unforseen anomalities would arise, and those Acts would not have the effect intended under the Berne Convention. It is unfortunately true that the International Copyrights Acts and the Berne Convention gives rise to many serious difficulties when applied to particular cases. But their Lordships are unable to discover any language in those acts which, without more, extends the area of the copyright conferred by the Act of 1862 on British subjects and persons resident in British Dominions to any country beyond the limits of the United Kingdom.

The short result is that those who want copyright in Canada for paintings or drawings, and photographs must obtain such copyright by complying with the laws of that country, there is no difficulty or expense worth mentioning in doing this.

IMPERIAL CUSTOM CONSOLIDATION ACT, 1876

IMPERIAL BOOK COMPANY v. ADAMS & CO.[1]

3. The Imperial Customs Consolidated Act, 1876, section 1876, requiring noti to be given to the Commissioners of Customs of copyright in a book, was not, having regard to section 151 of the Act, in force in Canada; and section 17 of the Imperial copyright Act, 1842, was applicable and having granted an injunction restraining the Imperial Book Company from importing into Canada any copies of the ninth edition of the "Encyclopædia Brittanica," and having ordered the delivery up of unsold copies thereof, and this judgment having been affirmed by the Court of Appeal for Ontario and by the Supreme Court of Canada, Lord Macnaghten declared that their Lordships were unable to advise His Majesty to grant special leave to appeal.

CORPORATION.

ILLEGAL ACTS.

CASGRAIN v. ATLANTIC AND NORTH-WEST RAILWAY CO.[2]

1. Article 997 of the Civil Procedure Code relates on its true construction, not to every illegal act done by an association therein mentioned, but only to such as are professedly or

1 Ontario, 23rd May, 1905, 21 T. L. Rep., 540.
2 Quebec, aff., 9th February, 1895, L. R., 1895, App. Cas., 282; 72 L. T. R., n.s., 369.

manifestedly done in the assertion of some special power, franchise, or privilege not conferred upon it by law.

2. Where an information under the article alleged that the respondent company had closed a public lane under the pretext that they had acquired private interests therein which entitled them so to do, held that this did amount to an allegation that they closed it in the exercise of any power, franchise, or privilege within the meaning of the article.

Assuming the lane in question to have been a public one, the respondent company were entitled to close, occupy, and use it with the assent of the city council, which assent was empowered by sect. 12 of the General Railway Act, c. 109 of the Revised Statutes of Canada, 1888.

LORD WATSON, page 295:—Their Lordships are of opinion that the words were meant to include not every act done by the company which can be shown to be contrary to law, but such acts only as are either professedly or from their very nature manifestly done in the assertion of some special power, franchise or privilege. The company might illegally occupy and use a public road and exclude the public in such circumstances as to bring them within the provisions of Art. 997. On the other hand, if one of their goods trains ran off the line and block a highway, and they failed to remove the obstruction within due time, they would be liable to an indictment for nuisance, but could not, in the Lordships' opinion, be reasonably said to have committed the nuisance in the exercise of the power, franchise or the privilege which did not belong to them.

CORPORATION (BENEVOLENT SOCIETY).

DUTIES OF DIRECTORS TOWARDS MEMBERS.

LAPOINTE v. L'ASSOCIATION DE BIENFAISANCE DE LA POLICE DE MONTREAL.[1]

3. The rules of the respondent police pension society provided that every application for a pension should be fully gone into by the board of Directors, and in particular that any member entitled thereto who is dismissed from the police force or is obliged to resign, shall have his case considered by the board and his right thereto determined by a majority.

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1 Quebec, rev., 27th July, 1906, L. R., 1906, App. Cas., 12 R. L., n.s., 535; 22 T. L. Rep., 768; 95 L. T. Rep., 479; 75 L. J. R., n.s., 73

4. On an application for a pension by the appellant who had been obliged to resign, the board without any judicial inquiry into the circumstances, resolved to refuse the claim, seeing that he was obliged to tender his resignation."

5. The Judicial Committee held, in an action by the appellant in effect to compel a due administration of the pension fund, that this resolution was void and of no effect.

6. The tender of resignation gave him the right of appeal to the board, and to have his claim as affected thereby duly considered and determined.

7. It did not by itself forfeit rights acquired by length of service and regular contribution to the pension fund. Case remitted to the Superior Court, with declaration directed to secure to the appellant a due consideration and determination thereof by a differently constituted board.

LORD MACNAGHTEN, page 537:—The appellant, Lapointe, who was plaintiff in the action, was a member of the Montreal Police force for twenty-nine years. He resigned on March 1st, 1902. His resignation was accepted on the 8th of the same month. He was also a member of the respondent association, the Montreal Police Benevolent and Pension Society, a society incorporated by statute and governed by rules, published in both English and French, to which all members of the society are bound to conform. On retiring from the force, Lapointe became qualified for a pension and entitled, subject to the rules of the society, to have his name placed on the pension roll.

The affairs of the society are managed by a board of directors composed of nine members. The superintendant of police is *ex-officio* a member and chairman of the board. The other members are elected in accordance with the rules.

The material rules are the 23rd and the 45th. Rule 23rd declares that "Every application for a pension, gratuity, or aid must come before the board, when the whole circumstances of the case will be fully gone into."

Rule 45th is in the following terms: "Any member entitled by length of service to a gratuity or pension, who is dismissed from the force, or is obliged to resign, shall have his case considered by the board of directors, determined by a majority of the board."

The French version differs slightly in language and structure. It may be translated as follows: "It shall be the duty of the committee"—meaning, evidently, the board—"to deliberate on the case of a member, who, having a right to a gratuity or a pension,

shall be dismissed from the police or obliged to give in his resignation. The majority of the committee shall decide whether such pension or gratuity should be accorded to him."

Two questions were debated at the Bar—(1) whether Lapointe was "obliged to resign" within the meaning of rule 45th, and (2) whether his case was fully considered and determined by the board.

On the first question their Lordships have come to the conclusion that Lapointe must be treated as having been "obliged to resign."

In February, 1902, he was suspended, and an inquiry into the circumstances of his suspension was about to be held. Then he sent in his resignation. It was accepted by the authorities, who thereupon withdrew all charges against him. It appears that at the time he felt himself much embarrassed by a pledge which he had given when he got into trouble on a former occasion to the effect that if he should again incur the censure of his superiors he would save all further trouble by resigning. There can be no doubt that he was under the apprehension that he might fare worse if an inquiry were held.

Then comes the question whether the case was fairly dealt with by the board.

The conduct of the board was most extraordinary. They first appointed a committee of four from their own body to investigate the reason of Lapointe's resignation. There would have been no objection to this course if the committee had been deputed to consider and report whether or not there was a *primâ facie* case for inquiry. But what the committee did was to listen to all sorts of stories about Lapointe's past, and take up everything that was against him during his connection with the force. Then, without telling Lapointe what the charges against him were, or giving him any opportunity of defending himself, they advised the board that the pension should be refused. Thereupon the board abnegated their judicial duties altogether. They summoned a general meeting of the members, and submitted a question which they were bound to determine themselves to a popular vote. The meeting was held on April 26th, 1892, when, by a large majority of the members present, it was resolved that Lapointe's name should not be entered on the pension roll of the society.

The whole of these proceedings were irregular, contrary to the rules of the society, and above all, contrary to the elementary principles of justice. And the position of the board was certainly not improved by a formal resolution stating solemnly, what was contrary to the truth, that after having inquired into the facts and circumstances which brought about Lapointe's resignation, and having deliberated upon his claim, the board "decides that the pension on which he claims be refused, seeing that he was obliged to tender his resignation." The respondents in their printed case actually rely on this resolution as concluding the whole matter, on

the ground that being certified by both the president and secretary of the society, it contents under the charter of the society "have to be accepted as fully proven."

It is obvious that the so-called determination of the board is void and of no effect.

It is hardly necessary to cite any authority on a point so plain.

The learned counsel for the appellant referred to two well-known club cases before Sir George Jessel, M.R., *Fisher* v. *Keane*,[1] and *Labouchere* v. *Earl of Wharncliffe*.[2] It may be worth while to mention a later case before the same learned judge, in which he refers to the case of *Wood* v. *Wood*[3] in the Exchequer, and expresses regret that he was not acquainted with that case when those club cases were decided. (See *Russell* v. *Russell*[4]).

"It contains," he says, "a very valuable statement by the Lord Chief Baron, as his view of the mode of administering justice by persons other than judges who have judicial functions to perform, which I should have been very glad to have had before me on both those club cases that I recently heard, namely, the case of *Fisher* v. *Keane*,[1] and the case of *Labouchere* v. *Earl of Wharncliffe*.[2] This passage I mean is this, referring to a committee: "They are bound in the exercise of their functions by the rule expressed in the maxim, "*Audi alteram partem*," that no man should be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

Then the Master of the Rolls says: "I am very glad to find that that eminent judge has arrived at the same conclusion which I arrived at independently, but I should have been still more glad had I been able to fortify my conclusion by citing this, which I may call a most admirably worded judgment."

Now, what was the duty of the board when Lapointe's claim was brought before them? What powers had they under the rules? If one compares the two versions, the French and the English, it is clear, on the one hand, that in the case of a member dismissed or obliged to resign, the board have to determine whether the pension to which he is *facie* entitled should be accorded him. But, on the other hand, it is equally clear that the appeal to the board is allowed to a member in order to prevent his case being held concluded by the mere fact of dismissal or forced resignation.

1 11 Ch. D., 353
2 13 Ch. D., 346
3 1874, L. R., 9 Ex., 190
4 1880, 14 Ch. D., 471
5 14 Ch. D., 479
6 13 Ch. D., 346.

It is not enough to find that the member was obliged to resign. The board of directors thought that finding of theirs conclusive, so did the Court of Appeal. But that is the very circumstance which gives the member the right of appeal of the board. The board have to inquire into the circumstances of the dismissal or forced resignation. It is not open to them to review the past career of a member who claims a pension and forfeit rights acquired by length of service and regular contribution to the fund, on the ground that faults which his employers have condoned or overlooked are, in the judgment, so grave as to justify them in punishing him by inflicting the extreme penalty of forfeiture. The board of directors must bear in mind that they are judges, not inquisitors.

So far the case seems to be simple enough. What remains is not so easy. Their Lordships have anxiously considered what order ought to be made now under the circumstances of the case. The action in substance, though not in form, is an action to administer the trusts of the pension fund, and to compel the trustees, that is, the board of directors, to administer these trusts in Lapointe's case in proper and legal manner. The board before whom Lapointe's case came have acted in a manner so grossly unfair and improper that their Lordships could not allow the case to go again before the same tribunal. Understanding, however, that the members of the tribunal will not be the same as the board is now composed of new members, their Lordships think that so extreme a measure is not required. At the same time they think that the action ought to be retained in the Superior Court and that the Court ought to keep its hand over the future proceedings of the board of directors in Lapointe's case.

Their Lordships think that the purposes of justice will be met by an order to the following effect:—

Declare that in the events which happened the appellant, Lapointe, ought to be considered as having been obliged to resign within the meaning of rule 45th.

Declare that the proceedings of the board in Lapointe's case were not a due consideration and determination of the matter before them as required by rule 45th, and that the said proceedings were null and void.

Discharge the order of the King's Bench and, except as to cost, the order of the Superior Court.

Remit the action to the Superior Court.

Order the respondents to pay the costs of the appeal to the Court of King's Bench.

Declare that unless the board of directors forthwith or within such time as shall be allowed by the Superior Court proceed duly to consider and determine the claim of the appellant to a pension.

the appellant will be entitled to have his name inscribed on the pension roll of the society.

Liberty for the appellant and the respondents and the board of directors respectively to apply to the Superior Court as to the conduct of any proceedings which may be taken in reference to the consideration and determination of the appellant's claim to a pension, the compensation of the board of directors summoned to consider and determine the question and as to subsequent costs, and generally as to any matter incidental to or consequential upon this order.

CORPORATION (COMPANY).

CHARGE ON UNCALLED CAPITAL.

ANGLO-AUSTRALIAN INVESTMENT, FINANCE, AND LAND COMPANY v. NEWTON ET AL.[1]

S. The memorandum of association among the objects for which the company was established were: To receive money on loan or deposit or otherwise, and upon any security of the company, or upon the security of any property of the company, or without giving security:—Held that these words authorised a charge on uncalled capital.

LORD MACNAGHTEN, page 246:—The power of a company limited by shares to charge uncalled capital has been the subject of several reported cases in this country. The Court seems almost always to have regarded such a charge with disfavour. Whenever the question has arisen, borrowing powers have been construed strictly and sometimes, perhaps, rather narrowly. But no case was cited to their Lordships in which any judge has ever held it to be beyond the powers of a limited company to create a charge upon its uncalled capital.

Stanley's Case,[2] in 1864, goes further in that direction than any other. There Lord Justice Knight-Bruce and Lord Justice Turner laid great stress on the difficulty of enforcing a charge on uncalled capital, owing to the discretionary power of making calls which the company's deed of settlement entrusted to the directors; and they seem to intimate that, assuming the borrowing powers of the company to have extended to future calls, it would have been a breach of trust, on the part of the directors, to give effect to the charge though created by their own act under the authority of the

1 New South Wales, aff., 6th March, 1895. L. R., 1895, A. C. 244; 64 L. J. R., n.s., 57; 43 W. Rep., 400.
2 4 D. J. and S., 407.

company—a proposition which it is somewhat difficult to follow. The decision, however, turned entirely upon the construction of the deed of settlement. There was power to charge "the property of funds" of the company. It was held that that expression did not include future calls. "They are property," said Lord Justice Turner "not of the society [illegible] but which may be called up by the directors of the society at their discretion." The context too was relied on as shewing that the property intended to be charged was property capable of being "assigned, transferred, conveyed, or surrendered." *Stanley Case* was approved and followed by this board in *The Bank of South Australia* v. *Abrahams*,[1] where the judgment was delivered by Lord Justice James. But there the difficulty in connection with the discretionary power of the directors in regard to calls was treated merely as an argument against implying a power to charge future calls where the language of the instrument was doubtful. And it certainly seems to be assumed in the judgment that by "apt and proper words of a sufficient context" a power to charge uncalled capital may be conferred. In *In re The Phœnix Bessemer Steel Company*,[2] the Master of the Rolls (Sir George Jessel) said: "There can be no doubt that the power can be given to a company by the articles of association." He brushed aside the difficulty which weighed so much with the Lords Justices, observing that to his mind it was no difficulty at all, and referring to the case of companies governed by the Companies Clauses Consolidation Act, 1845. Where such companies have power to create mortgages the statute itself confers upon them, as incidental to that power to charge future calls. The decision in *In re The Phœnix Bessemer Steel Company*[2] was in 1875. During the last twenty years Sir George Jessel's opinion has been followed in many cases; and many securities have been given and taken on the faith of it. Mr. Justice Kay adopted the same view in the case of *Howard* v. *The Patent Ivory Manufacturing Company*,[3] which was decided in 1888. More recently still, in 1890, the question came before the Court of Appeal in *In re The Pule Works*.[4] After examining all the previous authorities and discussing the matter very fully, Lord Justice Cotton and Lord Justice Lindley upheld a charge on uncalled capital. They found nothing in the Act expressed or implied to prevent or avoid such a security. Lord Justice Lopes, with some hesitation, concurred in the judgment. The main argument against the validity of the charge was that it seemed to contravene the directions of the Act in regard to the application of moneys recovered from contributories in the winding-up. But

1 L. R. 6 P. C., 265.
2 44 Law J. Rep. P. C., 76.
3 Law J. Rep. Chanc., 489.
4 57 Law J. Rep. Chanc., 878; Law Rep., 38 Ch. D., 156.

the answer was obvious. The liability of a contributory as a present member to pay calls in the winding-up is not a liability springing into existence for the first time on the company going into liquidation. It is merely the ripening of that liability which the contributory undertook when he became a member. The liquidator no doubt is bound to distribute what belongs to the company in the manner prescribed by the Act. But, after all, the question is: What does belong to the company? What are the assets of its property? That must depend on what dispositions have been made and what changes have been validly created while the company acting within its powers was free to deal as it pleased with its own.

Their Lordships see no reason to differ from the conclusion at which the Court of Appeal arrived in the case of *In re The Pyles Works*. But they desire to add that, if they had felt any doubt about the matter, they would have been most reluctant to introduce into the administration of the company law in a colony which has adopted the Act of 1862 a rule different to that established by judicial decisions in this country. There is no case in which uniformity of practice is more important or more desirable.

CONSTRUCTION OF CHARTER.

CITY OF MONTREAL V. STANDARD LIGHT AND POWER COMPANY.[1]

9. Section 5 of the respondent company's incorporating Act (55 and 56 Vict. c. 77) empowers it on certain conditions (which have been complied with) to lay its wires underground as the same may be necessary, and in so many streets, squares, highways, lanes, and public places as may be deemed necessary for the purpose of supplying electricity and gas:—

10. To open streets, that is, to break up their surface and excavate them, is plainly involved in this provision, and an injunction obtained by the respondents to restrain the municipality from interfering therewith was properly granted. Although the Municipal Council were entitled to oversee and prescribe the manner in which the streets were to be opened, the Council, they having taken no steps to exercise that power, after reasonable notice had been given, they had no further power to interfere with the execution of the work.

LORD MACNAGHTEN, page 116:—Their Lordships are unable to find any justification in law for the action of the appellants. The language of the Legislature is too plain to leave room for argu-

1 Quebec, aff., 3rd August, 1897, L. R., 1897, App. Cas., 527; 77 L. T. R., 115; 66 L. J. R., n.s., 113

ment. The appellants, indeed, contend that it was hardly possible to conceive that the Legislature could have meant to confer such extraordinary powers upon a mere trading company as to authorize them at their will and pleasure to interfere with public streets the care of which was committed to the municipality, and they suggest that sect. 5 of the Act 1892 may be construed as defining the objects of the company, and enabling them to lay down their wires provided that they first obtain the consent of the city. It is true that the section does not in express terms authorize the company to open streets, but that power is plainly involved in the authority given to them to lay their wires underground, and it is possible to read sect. 25 of the Act of 1892 without seeing that sect. 5 confers upon the company powers and privileges which but for sect. 25 they would be at liberty to exercise without interference from any quarter. Then it was argued that the company was bound to give the municipality reasonable time for considering their plans, and it was urged that a period of ten days is much too short a notice for a great municipal body, which must necessarily proceed in a somewhat leisurely fashion. Regular councils, it was said, were only held once a month, and, although a special council could be summoned at two days' notice, the respondents could hardly expect the Municipal Council of the City of Montreal to depart from their ordinary course of their convenience. There is, however, nothing to be found in the Act justifying the position taken up by the municipality and, considering that as early as May the company gave f[illegible] notice that they intended to exercise their powers, although [illegible] notice was not one which the municipal council were b[illegible] recognize, it is plain that provision might easily have [illegible] made for the emergency, even if the council could not bring themselves to summon a special meeting for such an occasion.

BOMBAY BURMAH TRADING CORPORATION v. DR. RABJI SHROFF.[1]

11. Where one of a company's articles of association provided that "no person shall be appointed or . . . . have authority to act as a proxy who is not a shareholder of the company":

12. On its true construction it is no objection to a proxy duly lodged that an unqualified person is named therein, provided that the qualification exists when the proxy is lodged and continues when it is used.

13. And as the articles did not require the shareholder using the proxy to be literally "named" therein, the proxy

1 Bombay [illegible] rev., 19th December, 1904, L. R., 1905 App. Cas., 213; 74 L. J. R., n.s., 41; 21 T. L. Rep., 148

could not be objected to, if he were sufficiently described for all business purposes, as for instance a member for the time being of a specified firm.

CONTRACT BEFORE INCORPORATION.

NORTH SYDNEY INVESTMENT CO. v. HIGGINS ET AL.[1]

14. The adoption and confirmation by directors of a company of a contract made before the formation of the company by persons purporting to act on its behalf, does not create any contractual relation between the company and the other party to the contract, or impose any obligation on the company towards that party.

NATAL LAND AND COLONISATION COMPANY v. PAULINE COLLIERY SYNDICATE.[2]

15. A company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. In order to do so a new contract must be made with it after its incorporation on the terms of the old one.

LORD DAVEY, page 126:—The contract was made with Mrs. de Carrey, and even if she can be treated as having made it on behalf either of the unincorporated syndicate, who were the promoters of the respondent company, or on behalf of the company itself when incorporated, it is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. It is unnecessary to cite all the cases in which this has been decided from *Kelner* v. *Baxter*[3] downwards.

DIVIDEND.

BURLAND v. EARLE ET AL.[4]

16. A company formed by letters patent, under Canadian Act 27 and 28 Vict. c. 23, is not bound to divide all its profits on each occasion amongst its shareholders. It can legally

1 New South Wales, aff., 25th February, 1899, 80 L.T.R., 303; 28 L.J.R., n.s., 42; 47 W. Rep., 481; 15 T.L. Rep., 232.

2 Natal, rev., 2nd December, 1903, L.R. 1904, App. Cas., 121; 89 L.T.R., 678; 73 L.J.R., n.s., 29.

3 L.R., 2 C.P., 174.

4 Ontario, rev., 9th November, 1901, L.R. 1902, App. Cas., 83; 85 L.T.R., 553; 50 W. Rep., 241.

reserve any portion thereof at its own discretion, and a Court has no jurisdiction to regulate it. Whether the undivided portion is retained to credit or profit and loss or carried to credit of a reserve, it may lawfully, in the absence of any express power, be invested in such securities as the directors may select, subject to the control of a general meeting, but not restricted to such investments as trustees are authorized to make.

It is not *ultra vires* for a company to invest in the name of a sole trustee. He is strictly accountable, but the dissentient shareholders are not entitled to an injunction against the directors and the company in respect of such investments, so long as it appears to be *bona fide*.

LORD DAVEY, page 93.—It is an elementary principle of the law relating to joint stock companies, that the court will not interfere with the internal management of companies acting within their powers, and, in fact, has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle*,[1] and *Mozley* v. *Alsters*,[2] and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares of the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character, or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works*.[3] It should be added

1 1843, 2 Ha., 461
2 1847, 1 Ph., 790.
3 1874, 30 T. L. Rep., 209; L. Rep., 9 Ch., 350

that no more informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act, when done regularly, would be within the powers of the company, and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish L.J., in *Macdonald v. Gardiner*.[1]

There is yet a third principle which is important for the decision of that case. Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the matter of the vote. This is shewn by the case before this Board of the *North-West Transportation Co., Ltd., v. Beatty*.[2] In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid, notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained.

If these elementary considerations are borne in mind, the solutions of the principal questions arising in this appeal will not present any difficulty.

Page 95:—Their Lordships are not aware of any principle which compel a joint stock company while a going concern to divide the whole of its profits amongst its shareholders. Whether the whole or any part should be divided, or what portion retained, are entirely questions of internal management which the shareholders must decide for themselves, and the Court has no jurisdiction to control or review their decision, or to say what is a "fair" or reasonable" sum to retain undivided, or what reserve fund may be "properly" required. And it makes no difference whether the undivided balance is retained to the credit or profit and loss account, or carried to the credit of a rest or reserve fund, or appropriated to any other use of the company. These are questions for the shareholders to decide, subject to any restriction or directions contained in the articles of association or by-laws of the company.

If the company may form a reserve fund or retain a balance of undivided profits it must, it would seem, have power to invest the moneys so retained. The junior counsel for the respondents contends that the company, in the absence of express power to invest, could employ the money only in its own business. This contention had no support either in principle or authority, and, if it were sound, the object for which a reserve fund is needed would in many cases be defeated. The business of this company affords a cogent instance. In order to obtain a government contract, it may be called upon to make a large deposit, or purchase new and expensive plant. It has no power to borrow, and, if it had no rest

1 34 L.T. Rep., 521, 1 Ch. Div., 13.
2 1887, 12 App. Cas., 589

or reserve fund, it would have no funds out of which to make the necessary expenditure. Upon what securities then, may the company invest its undivided profits or reserve fund? It is conceded at the bar that the company is not confined to such investments as trustees are authorized to make. The answer, therefore, can only be that the reserve fund may lawfully be invested on such securities as the directors may select, subject to the control of a general meeting.

IRREGULARITIES OF PROCEEDINGS.

MONTREAL AND ST. LAWRENCE LIGHT AND POWER CO. v. ROBERT.[1]

17. Under Quebec Act, 1 Edw. 7, c. 67, the appellant company was empowered to acquire and hold for the purpose of its business real or immovable estate not exceeding a specified sum in yearly value, in any part of the province, except the judicial district of Quebec; and, acting *bona fide*, it was the sole judge of what was required for that purpose.

18. When a purchase *intra vires* of the above Act had been effected by the company, under a resolution of the directors, at a meeting on July 17, 1901, which authorized the completion thereof subject to an option of reconveying within a specified time:—

19. Held, that after the lapse of the specified time the purchase was absolute, and that the company, which had furnished the vendor with a copy of the said resolution, as one which had been duly and regularly passed, could not avoid it by showing that it had been passed by an insufficient quorum.

LORD MACNAGHTEN, page 202:—It is quite true that the by-laws require the presence of three directors to make a quorum, and only two attended on the 17th. But, after all, the by-laws of a company constituted as the Montreal and St. Lawrence Light and Power Company was constituted are not public property. They concern matters of internal management. Those who deal with the company have no means of access to them, no right to pry into the company's archives or interrogate its officials. There was nothing to put Robert on inquiry, and the notary furnished him with a copy of a resolution, which purported to be a resolution of the directors duly and regularly passed. On the faith of that representation Robert altered his position and parted with his property. The company cannot now be heard to say to the vendor:

1 Quebec, aff., 7th February, 1906. 1 R. 1906. App. Cas. 196. 12 R.L. n.s. 77. 94 L.T.R. 229. 75 L.J.R. n.s. 37. P.J.C. 15 K.B. 137.

"You should not have given credit to what our people told you." If such a plea were listened to no one would be safe in dealing with a company having private regulations of its own, inaccessible to the outside world, to which appeal could be made, in case of need, to relieve it from solemn obligations or save it from a bad bargain.

Such being their Lordships' view, it would seem to be a work of supererogation to inquire whether the resolution of July 17th, if invalid, had been validated by subsequent resolutions, or by the subsequent conduct of the company.

JURISDICTION OF COURTS.

BURLAND v. EARLE ET AL.[1]

20. It is an elementary principle that a Court has no jurisdiction to interfere with the internal management of companies acting within their powers.

21. The company must sue to redress a wrong done to it; but if a majority of its shares are controlled by those against whom relief is sought, the complaining shareholders may sue in their own names, but must show that the acts complained of are either fraudulent or *ultra vires*.

See LORD DAVEY'S REMARKS:—At No. 16 above.

LIABILITY OF DIRECTORS.

HIRSCHE ET AL v. SIMS ET AL.[2]

22. Where the directors of a company made an agreement for the sale of the shares which was in fact partially *ultra vires*, but was made *bona fide* in the honest and reasonable belief that it was for the interest of the company they cannot be charged with *dolus malus* or fraud merely because the effect of the transaction was to cause a rise in the shares of the company which enabled them to sell shares of their own at prices which gave them large profits.

23. The proper measure of damage in an action brought by shareholders against the directors in respect of the transaction is the value of the shares to the company if the agreement had not been made.

24. A subsequent market price due to the influence upon a market fluctuating from day to day of the impugned transac-

1 Ontario, rev., 9th November, 1901, L. R., 1902, App. Cas., 83; 50 W. Rep., 241

2 Cape of Good Hope, rev., 28th July, 1894, 71 L. T. R., n.s., 337; 64 L. J. R., n.s., 1.

tion itself, is not the proper measure of what might have been realised from the shares if no transaction had taken place.

LIABILITY OF THE PRESIDENT. *See* BANKS AND BANKING: *cod. vis*

POWERS OF CHAIRMAN.

SALISBURY GOLD MINING CO. V. NATHAN ET AL.[1]

25. One of the articles of association of a limited company provided that, "The chairman may, with the consent of the members present at the meeting, adjourn the same." Under this article, the chairman was not bound to adjourn a meeting, even though a majority of those present desired it; and a resolution carried at such meeting after the chairman had rejected a motion, duly proposed and seconded for adjournment, was valid and effectual.

PURCHASE BY DIRECTOR FROM THE COMPANY.

BURLAND V. EARLE ET AL.[2]

26. Where a director purchased property, without a mandate, from the company and under such circumstances as did not make him a trustee thereof for the company, and thereafter resold the same to the company at a profit: It was held that whether or not the company was entitled to a rescision of the contract of resale, it was not entitled to affirm it and to at the same time treat the director as trustee of the profit made.

SHARES.

LAROCQUE V. BEAUCHEMIN.[3]

27. The shares of promoters of a company, incorporated under the Revised Statutes of Quebec, having been credited as paid in full under an arrangement by which half the amount thereof was paid in cash and half by receipts on account of the purchase price of the property acquired by the company.

28. It was held, under art. 4772, par. 1 (originally enacted as s. 1 of Quebec Statute 47, Vict. c. 73, and reproducing s. 25

1 Natal, rev., 10th March, 1897, 6 L. T. R., n.s., 212; 66 L. J. R., n.s., 62; 45 W. Rep., 591; 13 T. L. Rep., 272.

2 Ontario, rev., 9th November, 1901, L. R., 1902, App. Cas., 83; 71 L. J. R., n.s., 1; 50 W. Rep., 241; 18 T. L. Rep., 41.

3 Quebec, aff., 7th April, 1897, L. R., 1897, App. Cas., 358; 66 L. J. R., n.s., 59; 45 W. Rep., 639; 13 T. L. Rep., 336.

of the English Companies Act, 1867), that the shares were rightly so credited; the promoters having acted in good faith and the purchase price being fair.

LORD MACNAGHTEN, page 364: Before their Lordships an attempt was made to re-open the charge of fraud, which seems to have been abandoned in the Court of Review. It was urged that the price of the property was not fixed or considered by an independent board of directors, and that in this respect the transaction was improper and fraudulent. This argument seems to be based on a misconception of the decision in *Belmont v. New Sombrero Phosphate Co.*[1] where the facts were very different. In the present case it was disputed that every single shareholder was perfectly aware of all the circumstances attending the formation of the company, and that nobody was or could have been deceived. Indeed, their Lordships agree with the opinion of Jetté, J., who prefaced his judgment by observing that the promoters acted in perfect good faith, and that the value of the property was proved to be $835,000 at the least.

The learned counsel for the appellant then contended that the understanding between the parties was that the property should be sold for so many dollars cash and so much in shares. It was admitted that if this had been the real arrangement it would be in contravention of the statute. But the evidence is all the other way. According to the evidence there was an independent agreement, on the part of the promoters, to take so many shares presently payable in cash, and an independent agreement by the company to purchase the property for such money down. There was not even an attempt in cross-examination to shake the testimony on this point. The appellant's counsel were at last driven to question the authority of *Spargo's Case*,[2] and the long line of decisions in which that case has been approved and followed. They pointed out that on more than one occasion *Spargo's Case*[2] has been disapproved by the present Lord Chancellor *—In re Johannesburg Hotel Co.*[3]; *Ooregum Co. v. Rooper*[4]—and they asked their Lordships not to follow it.

Their Lordships are not prepared to dissent from the decision in *Spargo's Case*.[5] It is a decision of the highest authority. It was announced by James and Mellish, L.JJ., and the view which those eminent judges expressed had, as appears from their judgments, the approval of Selborne, L.C. Referring to *Fothergill's Case*,[4] in which sect. 25 of the Act of 1867 was considered, and in

1 1878, App. Cas., 1218.
2 L. R., 8 Ch., 407
3 1891, 1 Ch., 119.
4 1892, App. Cas.
5 L. R., 8 Ch., 270.

which judgment had been delivered only the day before by the Lord Chancellor and the Lords Justices, James, L.J., made the following observations, which are not applicable to the facts of the present case: "It was said by the Lord Chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section which would lead to such an absurd and unjust final result as this, that an exchange of cheques would not be payment in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be a payment in cash. In truth, it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within the meaning of this provision.... If a transaction resulted in this, that there was on the one side a *bona fide* debt payable in money at once for the purchase of property, and on the other side a *bona fide* liability to pay money at once on shares, so that if bank-notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did not appear to me in *Fothergill's Case*, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again: but that if the two demands are set off against each other, the shares have been paid for in cash.... Supposing the transaction to be an honest transaction, it would, in a court of law, be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this Court sitting in a winding-up matter. Of course, one can easily conceive that the thing might have been a mere sham, or fraud, or dee it seems to be entirely out of the question in this case, because everybody in the company knew of the transaction; every shareholder of the company was present and was a party to the resolution; there was no deceit practiced on any creditor, nor was there any registration of those shares, except as shares paid up. This seems to be to dispose of the case." "It is a general rule of law," added Mellish, L.J., "that in every case agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards." Even if this line of argument was less convincing than it appears to their Lordships to be, they would not be disposed to disturb an authority which has been accepted and acted on for more than twenty years.

It is to be observed that in the Quebec statute the expression "paid in cash" occurs in one place, and "paid in cash into the treasury of the company" in another, from which it may be inferred that "payment in cash," does not necessarily and in all cases mean payment "into the treasury of the company."

HARRISON v. BELLIOS.[1]

29. A party is *sui juris* and beneficially entitled to shares which he cannot disclaim is personally bound, in the absence of contract to the contrary, to indemnify the registered holder thereof against calls upon them. It is immaterial whether the beneficial owner originally created the trust by which the registered holder was plainly affected, or accepted a transfer of the beneficial ownership with acknowledge of the trust.

LORD LINDLEY, page 123: No one can be made the beneficial owner of shares against his will. Any attempt to make him so can be defeated by disclaimer. But the moment the defendant accepted the beneficial ownership of these shares, he became the plaintiff's *cestui que trust*, and the plaintiff had no option in the matter.

The next is to consider on what principle an absolute beneficial owner of trust property can throw upon his trustee the burdens accidental to its ownership. The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and no legal decisions navigating it unless there is some contract or custom imposing the obligation proper are wholly irrelevant and beside the mark. Even where trust property is settled on tenants for life and children, the right of their trustee to be indemnified out of the whole trust estate against and liabilities arising out of any part of it is clear and indisputable; although if that which was once one large trust estate has been converted by the trustees into several smaller distinct trust estates, the liabilities incidental to one of them cannot be thrown on the beneficial owners of the others. This was decided in *Fraser* v. *Murdoch*,[2] which was referred to in argument. But where the only *cestui que trust* is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee. This is no new principle, but is as old as trusts themselves.

Their Lordships made a review of the jurisprudence on commenting upon *Balsh* v. *Hyan*; *Phéné* v. *Gillan*[4]; *German Mining Co.*

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1 Hong Kong, rev., 8th December, 1900, L. R., 1901, App. C., 118.
2 6 App. Cas., 855.
3 1728, 2 P. Wms., 453.
4 5 Hare, 1.

v. *Ex parte Chippendale*[1]; *Castellan* v. *Kobson*[2]; *Loring* v. *Davis*[3]; *James* v. *May*[4]; *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*[5]; *Fraser* v. *Murdoch*.

STATUTORY DUTIES.

JOHNSTON AND TORONTO TYPE FOUNDRY COMPANY v. CONSUMERS GAS COMPANY OF TORONTO.[7]

30. Where by an Act extending the powers of the respondent company, certain duties and obligations were imposed on it for the benefit of its customers, with a view to the reduction of the price of gas contingent on the amount of surplus profit, but no pecuniary penalty was imposed for default, and no right of action given to persons aggrieved, provision, however, being made for its accounts being audited by direction of the mayor of the Corporation with whose assent the company was originally established:

31. It was held, that no individual customer had a right of action against the company for non-compliance with the provisions of the Act. Such a right only arises where given by the Act, and especially so where the Act as in this case is in nature of a private legislative bargain, and not one of public and general policy.

SURRENDER OF RIGHTS TO CROWN.

BIDDELORD v. THE KING.[8]

32. Where a statute provided that a chartered land company might surrender the charter of the company to the Crown, and all claim and title to the lands granted to them in the colony, and that on such surrender all the powers and privileges of the company should cease and determine, and all the lands, tenements, and hereditaments of the company in the colony should "thereupon revert to and become vested in Her Majesty as part of the demesne lands of the Crown in New Zealand, sub-

1 1853, D. M., 19.
2 L. R., 10 Eg., 47.
3 32 Ch. D., 543.
4 L. R., 6 H. L., 328.
5 1882, 22 Ch. D., 561.
6 6 App. Cas., 855.
7 Ontario, aff., 1st April, 1898, L. R., 1898, App. Cas., 447; 67 L. J. R.
8 New Zealand, aff., 8th February, 1905, 92 L. T. R., 247.

ject nevertheless to any contracts which might then be subsisting in regard to any of the said lands":

33. On such surrender taking effect, the Crown did not assume the position which the company occupied before the surrender, but all the property of the Crown reverted to and vested in the Crown in absolute and unqualified dominion, free from any trust cognisable and enforceable by any court of law or equity.

See ACQUIESCENCE: *In Articles of Association*; LEGISLATION: *Incorporation of Company*; LIBEL: *By Servant of Corporation.*

CORPORATION (MUNICIPAL).

APPROPRIATION.

DECHÊNE v. CITY OF MONTREAL.[1]

34. The 37 Vict. (Quebec), c. 51, s. 101, authorised the respondents to make an annual appropriation to meet municipal expenses, and the 42 and 43 Vict. 6, 53, s. 12, provided that any municipal elector may petition the Superior Court to obtain the annulment of any appropriation within three months of such appropriation.

LORD WATSON, page 15:—The effect of these provisions, taken by themselves, appears to their Lordships to be plain, and free from ambiguity. They confer upon each and every municipal elector the right, which he had not at common law, to challenge, on the score of illegality, any corporate appropriation of money to meet the expenses of the current year, subject to the condition that the right shall prescribe, if not exercised within three months from the time when the appropriation comes into force. They also confer upon the corporation an absolute immunity from liability to have the legality of the appropriation questioned, at the instance of any person whatever, after the lapse of these three months. But they do not interfere with any right existing by law to impeach the appropriation, after the expiry of the three months, upon the ground that it was beyond the competence of the corporation.

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1 Quebec, aff., 28th July, 1894, 64 L. J. R., n.s., 14.

APPROVAL OF BYLAW BY RATEPAYERS.

HANSON ET AL v. CORPORATION OF GRAND-MERE.[1]

35. A contract by which a corporation guarantees the debentures of a company is a contract involving financial obligations on the part of the corporation within section 7 (c) of the Quebec Water Company's Act, 1897.

36. A municipal by-law under which such contract was made requires the approval of a majority of the whole body of ratepayers when passed in order to be valid.

LORD DAVEY, page 304:—By the contract of the 20th June, 1899, the company undertook to construct the works on the conditions agreed upon, and the council agreed to receive the revenues in trust, and to guarantee the debentures on the same terms as are mentioned in the by-law. The learned judge in the Superior Court, on the authority of a case of *Hanson v. Corporation of the Village of Gatineau*,[2] held that the guarantee purporting to be given by the respondents in the present instance was *ultra vires* on the ground that the bonds were issued without the authority of the Lieutenant-Governor to the by-law. And the Court of King's Bench confirmed this decision. Blanchet, J., alone dissented from the judgment of the King's Bench, as he had done in the Gatineau case, and referred to his judgment in that case for the reasons of his opinion. It appears from a perusal of that judgment that in the opinion of the learned judge, sect. 7 c. applies only to cases in which the corporation contracts direct financial obligations by causing waterworks to be constructed for the corporation itself, and at his own cost, and is therefore the principal debtor, and that the section had no application to a case where the corporation guarantees the obligations of a contractor or concessionaire who is the principal debtor in sect. 27. Lacoste, C.J., was of opinion that the provisions of sect. 27 must be read together with and subject to those of sect. 7 (c), and that the petition of the majority of that portion of the municipality to which the system extends (required by sect. 27) is not a substitute for the approval of a majority of the whole of the electors upon whom the burden is imposed. In the Supreme Court, Girouard, J., dissented from the opinion of the other learned judges of the court on the same grounds as those stated by Blanchet, J., and he also expressed that the debentures were negotiable instruments. The majority of the Court concurred in giving judgment for the present respondents, but gave no written reasons.

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1 Supr. Co., Canada, Quebec, aff., 5th August, 1904, 91 L. T. R., 303; 73 L. J. R., n.s., 105; 20 T. L. Rep., 772.
2 Quebec L. Rep., 10 K. B., 1901, 346.

Their Lordships are of opinion that the contract of the 20th June, 1899, is a contract involving financial obligations on the part of the corporation within the meaning of sect. 7 (c) of the Water Company's Act. They are not prepared to say with Hall, J., that the powers of sect. 27 do not extend to giving a personal guarantee by the corporation. But they think with Lacoste, C.J., that the two sections must be read together. Sect. 27 authorizes a very special form of contract, in which the giving of a guarantee is an incident, but there is nothing to take such a contract out of the express and unqualified provisions of sect. 7. They also agree that the requirement, as a condition precedent of a petition by a majority of the ratepayers of a part only of the municipality is not a substitute for the approval of the by-law when passed by a majority of the whole body of ratepayers, and it makes no difference in the construction of the Act that in the present case the two bodies were identical. The two conditions seem to be *diverso intuitu*.

ASSESSMENT.

TORONTO RAILWAY COMPANY v. TORONTO CORPORATION.[1]

37. The electric cars and apparatus and plant of a tramway company are not assessable as real estate under an Act which includes under the terms "land," "real property," and "real estate" things "erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty.

DAMAGE BY BAD STATE OF ROADS.

CORPORATION OF VICTORIA v. PATTERSON ET AL.[2]

38. By the law of British Columbia, roads and bridges are vested in the Dominion or the Province, unless, or until, they are adopted by particular municipalities. The statute does not prescribe any particular form of adoption.

39. In a case in which a corporation had maintained, controlled, and repaired a bridge for several years, but had not formally adopted it by any corporate Act: It was held that the corporation had competently assumed the maintenance and control of the bridge, and were liable for negligence in respect of it.

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1 Ontario, rev., 5th August, 1904, 73 L. J. R., n.s., 120; 23 T. L. R., 480.
2 British Columbia, aff., 9th June, 1899, 81 L. T. R., 270; 68 L. J. R. n.s., 128.

DAMAGE BY DRAINAGE WORKS.

PRESIDENT AND COUNCIL OF COLAC v. SUMMERFIELD.[1]

40. A municipal authority executed certain drainage works under the powers conferred on them by an Act of Parliament, which also provided that they should make compensation to the owners and occupiers of any lands for any damage which they may sustain through the exercise of any of the powers conferred by this section. In an action brought by the respondent to recover compensation under the section, the jury found that there was negligence in the construction of the drain.

41. It was held (1) that this finding must not be taken to mean that the works complained of were not constructed in the exercise of the powers conferred by the Act: (2) that the respondent could under the section recover compensation for future damage.

EXERCISE OF STATUTORY POWERS.

EAST FREMANTLE CORPORATION.[2]

42. The appellant municipality, in the exercise of authority conferred by the Western Australia Municipal Institutions Act (59 Victoria No. 10), section 109, and at the request of the ratepayers, in order to improve a street reduced the gradient opposite the respondent's house so that it was left on the edge of a cutting with a drop of about six or eight feet to the road:—

43. It was held that the respondent was without remedy, since none had been given by statute, and the appellants had not exceeded the powers conferred.

LORD MACNAGHTEN, page 217:—The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statutes. That was distinctly laid down by Lord Kenyon and Buller, J., and their view was approved by Abbott, C.J., and the Court of King's Bench. At the same time Abbott,

1 Victoria, aff., 24th March, 1893, 68 L. T. R., 769.
2 Western Australia, rev., 18th December, 1901, L. R., 1902, App. Cas., 213; 71 L. J. R., n.s., 39.

C.J., observed that if in doing the act authorized the trustees acted arbitrarily, carelessly, or expressly, the law, in his opinion, had provided a remedy. These words, "arbitrarily, carelessly, or expressly," were taken from the judgment of Gibbs, C.J., in *Sutton v. Clarke*,[1] decided in 1815. As applied to the circumstances of a particular case, they probably create no difficulty. When they are used generally and at large, it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language, Turner, L.J.,[2] observed in somewhat similar terms, that "such powers are at all times to be exercised *bona fide* and with judgment and discretion." And in a recent case, where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act, the present Master of the Rolls, then Collins, L.J.,[3] observed that: "the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs."

In a word, the only question is, Has the power been exceeded? Abuse is only one form of excess.

Their Lordships are of opinion that the principle laid down by Lord Kenyon and Abbott, C.J., have not been, in the slightest degree, modified by the more recent cases referred to by Hensman, J. There were cases where, upon the true construction of the particular statute under consideration, the Court held that there was an intention of authorizing interference with private rights.

In *Geddis v. Proprietors of Bann Reservoir*,[4] the defendants had flooded the lands of the plaintiffs, and had done so, as the Court held, without any statutory authority.

In *Metropolitan Asylum District v. Hill*,[5] the remarks of Lord Watson must be taken in connection with the circumstances of the case with which his Lordship was then dealing. As his Lordship observes, "what was the intention of the legislature in any particular act is a question of the construction of the Act." There it was held, as Lord Selborne pointed out, that there was no statutory right to commit a nuisance, and that no use of any land which must necessarily be a nuisance at common law was authorized. As Lord Blackburn observed in a later case,[6] quoting Bowen, L.J., there was not to be found in the act under consideration in *Metropolitan Asylum District v. Hill*,[7] "any element of compulsion, or any indication of an intention to interfere with private rights."

In *Vennon v. Vestry of St. James*,[8] in the very sentence quoted

1 1815, 6 Taunt, 34; 10 R. R., 563
2 Galloway v. Corporation of London, 1854, 2 D. J. & S., 213, 229
3 1898, 2 Ch., 613.
4 3 App. Cas., 430.
5 6 App. Cas., 582.
6 1855, Truman v. London, Brighton and South Coast Ry. Co., 11 App. Cas., 64.
7 6 App. Cas., 582
8 16 Ch. D., 449

by Hensman, J., James, L.J., went on to say that he was of opinion that there was no legislation in the case authorizing the vestry to interfere with private rights. In an earlier part of his judgment the Lord Justice had observed, "there are no words here that authorize the vestry to commit a nuisance."

The learned counsel for the appellant was unable to refer their Lordships to a report of the Victorian case of *King* v. *Mayor of Kew*. If the effect of the judgment is correctly stated by Hensman, J., their Lordships are compelled to express their dissent from it.

GRANTING OF EXCLUSIVE RIGHTS.

HULL ELECTRIC COMPANY v. OTTAWA ELECTRIC COMPANY ET AL.[1]

44. In 1887, the town Council granted to the O. Company permission to place posts in the streets for the establishment of a system of electric lighting, and the company established such system.

45. In 1894, the H. Company obtained the "exclusive privilege" during thirty-five years of establishing in the town a system of lighting and heating, whether by gas, electricity, or otherwise. This permission to the former company could legally be granted by a simple resolution of the town Council, and this grant was confirmed by an Act of the Provincial Legislature.

46. The Corporation professed to grant such exclusive rights "as it possesses and as it has the right to grant this day."

47. It was maintained that the grant to the H. Company was made subject to the existing rights of the O. Company, and did not operate as a revocation of the licence to them.

LORD MACNAGHTEN, page 210:—Nor is there any difficulty with respect to the resolution of April, 1887. Ahearn and Soper asked for nothing more than a permission in its nature revocable. Nothing more was given to them. There seems to be no reason why such a permission should not be granted by a simple resolution and recalled in a similar manner.

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1 Quebec, aff., 22nd February, 1902, 80 L. T. R., 209; 71 L. J. R., n.s., 38; 18 T. L. Rep., 344.

MARTIN v. TAYLOR.[1]

48. Under the New South Wales Act (2 Edw. 7. No. 35, s. 24), according to its true construction a person holding a civic office is not liable to a penalty as being knowingly interested in a contract with his municipality, when he has merely supplied materials to a contractor, who chooses to buy them from him, without any concerted arrangement that he should do so.

LORD LOREBURN, L.C., page 380:—There are many ways in which a person holding a civic office might be brought within the Act 2, Edw. VII., No. 35, as, for instance, if he had a share in the original contract, or, if he were employed by way of subcontract to execute the original contract or part of it: or, it might be perceived by the Court that an arrangement had been made under which he was to be the person to supply the materials for the original contract. In those cases, whether it was done directly or indirectly, he might be liable, and no device to conceal the real nature of the transaction would prevail. But their Lordships do not think that he is liable merely for supplying materials to the contractor who chooses to buy them from him without any sort of understanding or arangement that he should do so. Courts of justice in such cases would be vigilant to observe evidence of any concert to enable a civic officer to derive benefit from a contract. But in the present case there is no proof to shew the liability of the respondent.

CORPORATION OF RALEIGH v. WILLIAMS.[2]

49. Where a drainage work constructed by a municipality, under statutory powers, does not answer its purpose in consequence of faulty construction, or damages land by draining water upon it, which would not otherwise have come there, it does not amount to actionable negligence on the part of the municipality.

LORD MACNAGHTEN, page 509:—It seems to their Lordships most reasonable that no action should be brought for a *mandamus* to compel a municipality to execute repairs until after notice in writing has been given to them. But it would be very unreasonable to enact that a municipality is bound to repair all drainage

1 New South Wales, aff., 10th April, 1906, L. R., 1906, App. Cas., 378; 94 L. T. R., 591; 22 T. L. Rep., 45; 75 L. J., P. C., 79.
2 Supr. C., Canada, Ontario, aff., 3rd August, 1893, 69 L. T. R., 506; 62 L. J. R., 1.

works within its limits, and at the same time to say that a municipality is not to be liable for any breach of that statutory duty, however gross the breach may be, unless previous notice in writing is given. Damage by floods for the most part is sudden and unexpected. A man's property may be entirely ruined before it is possible for him to give any notice to the municipality, and yet, if the contention of the appellants is correct, he would be left without remedy, for there is no provision for in the statute relating to such a case.

HAWTHORN CORPORATION v. KANNULUIK.[1]

50. Where municipal authorities under their statutory powers took over the care of a watercourse and made it into a public drain, which proved in course of time to be increasingly insufficient to hold and pass on the mixture of slime and sewage poured into it, with the result that the plaintiff's property was flooded thereby:—

51. They were liable for negligence, notwithstanding that the drain when first formed was sufficient for its purpose.

POWERS.

CITY OF TORONTO v. VIRGO.[2]

52. A statutory power conferred upon a municipal council to make by-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner:—

53. Where under ch. 184 of Revised Statutes of Ontario, 1887, s. 495, a municipal by-law was passed prohibiting hawkers from plying their trade in an important part of the municipality, no question of a pretended nuisance having been raised.

LORD DAVEY, page 93:—No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise, both as to time and to a certain extent as to place where such restrictions are, in the opinion of the public authority, necessary to prevent a nuisance or for the maintenance of order. But their

1 Victoria, aff., 7th November, 1904, L. R., 1906, App. Cas., 105; 93 L. T. R., 644; 75 L. J., P. C., 4.

2 Supr. C., Canada, aff., 16th November, 1895, L. R., 1896, App. Cas., 88, 65 L. J. R., n.s., 4.

Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and, indeed, a power to regulate and govern seems to imply the continued existence of that which is to be regulated.

PROPERTY IN STREET.

MUNICIPAL COUNCIL OF SYDNEY v. YOUNG.[1]

54. By an Act of Parliament "all public ways in the city of Sydney now or hereafter formed shall be vested in the Council."

55. A portion of a street in the city was required to form a tramway under a local Act.

56. It was held that the Council had no such property in the street as to entitle them to compensation under the Act for the part so taken.

PUBLIC STREET.

MOCRRAY ET AL. v. DREW.[2]

57. A colonial statute gave power to the corporation of a town to drain, pave, &c., streets, courts, and alleys in the town on private land, and to recover the expense from the owner or occupiers of premises abutting upon and accessible from and communicating with such street, court, or alley.

58. That act did not by necessary implication confer upon such adjoining owners or occupiers any larger right of user of such street, &c., than they had previously enjoyed.

MUNICIPALITY OF PICTON v. GELDERT.[3]

59. The transfer of an obligation to repair a highway to a public corporation does not of itself render such corporation liable to an action in respect of mere non-feasance. To do so the Legislature must have used language indicating an intention that this liability should be imposed.

LORD HOBHOUSE, page 115:— By the common law of England, which is also that of Nova Scotia, public bodies charged with the

1 New South Wales, aff., 10th March, 1898, 78 L. T. R., 365; 67 L. J. R., n.s., 40.
2 Victoria, rev., 4th March, 1893, 68 L. T. R., n.s., 549.
3 Nova Scotia, rev., 3rd August, 1893, 42 W. Rep., 114.

duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were, nevertheless, not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair. This was first held in a case in which the inhabitants of a county were sued, and as they were not a corporation there was a technical difficulty in suing them; but that the decision did not rest on this technical difficulty alone, but on the substantial ground of non-liability, was subsequently decided when the difficulty had been removed by enabling a public officer to sue and be sued on behalf of the county. And the same conclusion has been arrived at where the obligation to repair has been transferred to corporations.

The latest English case is that of *Cowley* v. *The Newmarket Local Board*,[1] decided in the House of Lords. It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed.

The law was laid down by this Board in the case of *The Sanitary Commissioners of Gibraltar* v. *Orfila*,[2] thus: In the case of mere non-feasance no claim for reparation will lie, except at the instance of a person who can show that the statute or ordinance under which they act imposed upon the Commissioners a duty towards himself which they negligently failed to perform."

RIGHTS AND LIABILITIES.

MUNICIPAL COUNCIL OF SYDNEY v. BOURKE.[1]

60. A statute relating to a municipal corporation repealed previous statute and provided that all rights and liabilities existing at the commencement of this Act shall be and continue to be as binding or as enforceable in favour of the corporation as if this Act had not been passed.

61. These words could not be taken to include all the powers and duties possessed by or imposed on the corporation by the repealed statutes.

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1 1892, App. Cas., 345; 41 W. R Dig., 85.

2 15 App Cas., 411; 30 W R., 282.

3 New South Wales, rev., 28th May, 1895, 72 L. T R., n s., 605

TAXATION.

LE SÉMINAIRE DE QUÉBEC v. LA CORPORATION DE LIMOILOU[1]

62. By the true construction of article 712, subsection 3, of the Municipal Code of Quebec, property belonging to a corporation "for the ends for which they are established, and not possessed solely by them to derive a revenue therefrom," is not taxable:—

63. A farm belonging to the appellant corporation and worked by them as a farm in order to derive revenue therefrom, is taxable although not detached from the residue of the corporate property and occasionally used for the above ends.

SIR HENRY STRONG, page 294:—In 1881, in the case of the *Corporation of Verdun* v. *Les Sœurs de Notre-Dame*,[2] the Court of Appeal of the Province of Quebec held, under facts similar to those of the present case, that the lands were exempt. The late Chief Justice of that Court, Sir Antoine Dorion, however, dissented, and in a forcible judgment stated as his reasons for differing, the same arguments as those which have prevailed in the present case. In the *Corporation of St. Roch* v. *Seminary of Quebec* (the present appellants),[3] the same Court followed its previous decision in the case of Verdun. In 1884, the question arose in an appeal before the Supreme Court of Canada, *Les Commissaires de St. Gabriel* v. *Les Sœurs de la Congrégation*,[4] and that Court, adopting the opinion of Dorion, C.J., in the Verdun case, held the lands in question not exempt from taxation.

If the farm lands of Maizerets upon which it is now sought to impose the taxation in question, had been detached altogether from the part of the property lying between the railway and the river, it seems to their Lordships that it would be impossible for the appellants to contend that they were not possessed solely for purposes of revenue, and that none the less could they in that case be said to be possessed for the purposes of revenue because the ecclesiastics and pupils of the Seminary were in the habit, after the crops had been harvested, of walking for purposes of exercise over the fields composing the farm. Then, if in the supposed case there would be no exemption, their Lordships are at a loss to see any reason why a difference should be made as regards that actually before them upon the facts in evidence in this appeal. The working of this

1 Quebec, aff., 24th February, 1899, L.R., 1899, App Cas., 289; 80 L.J.R., 331; 68 L.J.R., n.s., 34; 15 T.L.R., 229.
2 1881, Dorion's App Cas., 163
3 1884, 102 L.R., 335.
4 1884, 12 L.C.R., 45

farm by acquiring a revenue therefrom, and it is shewn that they do, in fact, derive a clear profit from its cultivation; though the absence of this last condition could not make any difference in the disposition which their Lordships think it proper to make of this appeal.

CANADIAN PACIFIC RAILWAY v. CORPORATION OF THE CITY OF TORONTO.[1]

64. Where an agreement between the appellant railway and the respondent corporation provided for a renewable lease from the latter to the former of a large tract of land for railway purposes, but was silent as to payment of taxes by the appellant:

65. The Judicial Committee held that the lease should contain a covenant by the appellant to pay the same, partly because the effect of the Assessment Act in force at the date of the contract was to impose such liability on the lessees of municipal lands without recourse to the corporation, and partly because a covenant to that effect was shown to be a usual covenant in the sense that the corporation invariably insisted on it in their leases.

LORD DAVEY, page 36: The appellants do not, in fact, contend that the liability for payment of the taxes ought to be imposed by the lease on the corporation, but they wish the matter to be left at large with a view to future litigation. Their Lordships do not think this would be right, and they think that the corporation are entitled to the covenant as a reasonable protection against the property, which is the security for their rent, being taken in execution for non-payment of taxes. The corporation have a duty towards those for whose benefit they hold their land, and they would be guilty of something like negligence if they did not insist on the insertion of the covenant in question in the leases.

USE OF STREET FOR RAILWAY.

WINNIPEG STREET RAILWAY COMPANY v. WINNIPEG ELECTRIC STREET RAILWAY COMPANY AND THE CITY OF WINNIPEG.[1]

66. Where a municipal council granted to a railway company authority to construct, maintain, and operate railways in the

1 Ontario, aff., 11th November, 1904, L. R., 1905, App. Cas., 33; 74 L. J. R., n.s., 15; 21 T. L. Rep., 44

1 Manitoba, aff., 30th June, 1894, L. R., 1894, App. Cas., 615.

streets with the exclusive right to such portion of any street as shall be occupied by the railway, but with any portions of any streets not in actual occupation by their rails.

67. Held, that a subsequent clause in the deed of grant giving to the company the refusal on terms of other streets in the city for railway purposes was insufficient to constitute, contrary to the plain meaning of the previous stipulati , a right of monopoly in any of the streets in the city.

Question, whether if a monopoly had been conceded it was *ultra vires* of the municipal council

See LICENCE: *Revocation of By-Law.*

COSTS.

BY SUCCESSFUL PARTIES.

FORGET v. OSBORN.[1]

1. A successful party to a suit may be made to bear the costs of both sides when the amount is small, but involved a question of wide general interest.[1]

See APPEAL: *In question of costs; Costs in cases with the Crown.*

COURT MARTIAL.

See APPEAL: *Eodem verbo.* MARTIAL LAWS: *State of war.*

CRIMINAL LAW.

CONSPIRACY AND LARCENY.

UNITED STATES OF AMERICA v. GAYNOR ET AL.[2]

1. Where an indictment for conspiracy has been framed in which acts of larceny are charged as over acts of the conspiracy, the prosecution are not estopped from treating them as distinct and independent acts of larceny.

LORD HALSBURY, L.C., page 280:—The substance of Caron, J.'s, determination appears to have been that no offence within the meaning of the Extradition Act was shown upon the document that

1 Quebec, 1895, L. R., 1895, App. Cas., 327.
2 Quebec, rev., 8th February, 1905, 92 L. T. R., 276.

had been brought before him by a writ of *certiorari*. Their Lordships are wholly unable to agree with him. There was an accusation of theft, which is an offence in both countries, but the learned judge does not appear to have apprehended that an accusation, on information, of theft was enough for the claim to arrest and detain. Whether the accusation was well founded, or whether there was enough to justify the Extradition Commissioner in committing for surrender, was a question which would have been regularly brought before him and determined at the proper time, if the due course of justice had not been interfered with by the interposition of the learned judge. The learned judge accurately points out that a conspiracy is not an offence within the treaty, and because an indictment for conspiracy has been framed, in which acts of larceny are charged as overt acts of the conspiracy, the learned judge seems to think that the United States Government are estopped from treating them as distinct and independent acts of larceny. The whole matter, and (*inter alia*) how much evidence there was of larceny, would have been duly and properly investigated if the case had been allowed to take its proper course.

EVIDENCE.

MAKIN ET AL v. ATTORNEY GENERAL OF NEW SOUTH WALES.[1]

2. Evidence tending to show that the accused has been guilty of criminal acts, other than those covered by the indictment, is admissible in a criminal case, if it be relevant to an issue before the jury as bearing upon the question whether the act alleged in the indictment was designed or accidental or to rebut a line of defence.

3. The appellants were indicted for the murder of an infant child whom they had taken in to nurse upon payment of a small sum, alleging that they desired to adopt it as their own.

4. It was held that evidence that several other infants had been received by the prisoners on like representations and upon payment of sums inadequate to support them for more than a short time, and that bodies of infants had been found buried in the gardens of several houses occupied by the prisoners was admissable.

LORD HERSCHELL, L.C., page 781:—The point of law involved is whether where the judge who tries a case reserves for the opinion of the court the question whether evidence was improperly admitted, and the court comes to the conclusion that it was not legally ad-

1 New South Wales, aff., 12th December, 1893, 69 L. T. R., 778; 63 L. J. R., n.s., 41

missible, the court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged. It was admitted that it would not be competent for the court to take this course at common law, but it was contended that sect. 423 of the Criminal Law Amendment Act of 1883 (46 Vict., No. 17) empower, if even it did not compel the court to do so.

KOPS v. THE QUEEN.[1]

5. The Criminal Law and Evidence Amendment Act, 1891, New South Wales (55 Vict. No. 5), by section 6 provides that "every person charged with certain indictable offences shall be competent, but not compellable, to give evidence in every Court on the hearing of such charge:—

6. Under such law, it is legitimate for a judge, upon the trial of a prisoner for an offence within the above Act, in commenting upon the facts proved, to refer to the competence of the prisoner to give evidence on his own behalf, and to the fact that the prisoner has not tendered himself as a witness.

HIGH TREASON.

DE JAGER v. ATTORNEY GENERAL OF NATAL.[1]

7. A resident alien within British territory owes allegiance to the Crown, and if he assists invaders during the absence of State forces for strategical or other reasons he is rightly convicted of high treason. Special leave to appeal from a judgment to that effect refused. There is no sufficient authority for the doctrine that the alien's duty of allegiance ceases if an enemy makes good his military occupation of the district in which the alien resides.

LORD LOREBURN, L.C., page 329:—It is old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though not a subject. Some authorities affirm that this duty and liability arise from the fact that while in British territory he receives the King's protection. Hence, Sir R. Finlay argued that when the protection ceased its counterpart ceased also, and that as the British forces evacuated

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1 New South Wales, aff., 9th June, 1894, 64 L.J. R., n.s. 35

1 Natal, 9th May, 1907, L.R., 1907, App. Cas., 326; 23 T.L.R., 516

Waschbank on October 21st, 1899, the petitioner was lawfully entitled to assist the invaders on and after October 24th without incurring the penalty of high treason.

Their Lordships are of opinion that there is no ground for this contention. The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by the ordinary courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled. Their Lordships consider that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the Sovereign who extended it. In modern times great numbers of aliens reside in this and in most other countries, and in modern usage it is regarded as a hardship if they are compelled to quit, as they rarely are, even in the event of war between their own Sovereign and the country where they so reside. It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could, with impunity, take up arms for the invaders. A small invading force might thus be swollen into a considerable army, while the risks of transport (which, in the case of oversea expeditions, are the main risks of invasion) would be entirely evaded by those who, instead of embarking from their own country, awaited the expedition under the protection of the country against which it was directed. These considerations would not justify a British court in deciding any case contrary to the law, but they offer an illustration of consequences which would follow if the law were as the petitioner maintains. There is no authority which compels their Lordships to arrive at so strange a conclusion.

HUSBAND AND WIFE.

BROWN v. THE ATTORNEY GENERAL OF NEW ZEALAND.[1]

8. The fact that the parties charged with a crime are married does not form a presumption of compulsion by the husband, and no such presumption arises where a woman pro-

1 New Zealand, aff., 19th November, 1897, 67 L.J.R., n.s., 7; 14 T.L.Rep., 48

cures and contrives the commission of an offence committed by the husband in her absence; and in such a case section 24 of the New Zealand Criminal Code, which excuses a person actually present at this perpetration of a crime and under the compulsion of threats, has no application.

LORD HALSBURY, page 9:—The Chief Justice states that the jury at the trial found that the prisoner was married to the other defendant, and that she acted under his control.

For the latter proposition there is not a scintilla of evidence, and no such question should have been left to the jury. The mere fact that the parties are married never even formed a presumption of compulsion by the husband. Even as early as Bracton's time, if the wife was voluntarily a party to the commission of a crime, her coverture furnished no defence—*see Bracton*, Book III., c. 32, who says:

"Quid erit si uxor cum viro conjuncta fuerit, vel confesse quod viro suo consilium praestiterit et auxilium, numquid tenebuntur ambo unot ut videtur," and he goes on to add, desicut sunt participes in crimine, ita erunt participes in poena.

Questions have from time to time arisen how far the mere presence of the husband at the time of the commission of the offence should furnish a presumption of marital control, and the decisions on that subject have not been entirely uniform. But their Lordships are of opinion that here even that question does not arise. The acts attributed to the prisoner were acts done by herself in the absence of her husband, conclusively establishing that she was voluntarily acting and aiding and assisting to arrangements leading up to, and intended to assist the commission of the offence which was afterwards consummated.

JOINDER OF OFFENCES.

WENTWORTH v. MATHIEU.[1]

9. There having been numerous convictions of the respondent, with accumulated penalties amounting to $1100, for having on various occasions sold intoxicating liquor, and thereby committed offences under the Canada Temperance Act of 1864, a certiorari was granted in one case by the Superior Court, on the ground that by the true construction of sect. 17, which provides that two or more offences by the same party may be

1 Quebec, rev., 17th February, 1900, L. R., 1900, App. Cas., 212; 81 L. T. R., 160; 69 L. J. R., n.s., 11; 16 T. L. Rep., 22;

offences under the Act during the limitation period of three months prescribed by sect. 15:—

10. It was held that in the absence of express words to that effect, sect. 17 must be construed as permissive merely, and not imperative.

MISAPPROPRIATION OF FUNDS.

NELSON v. THE KING.[1]

11. The appellant, a director of a banking company, opened a "trust account" irregularly, and without the consent of the board, and had from time to time considerable overdrafts on the account. The bank stopped payment, and at that time a large sum was due from the appellant on such overdrafts, but he was solvent at the time such overdrafts were made.

12. It was held under the circumstances there was no evidence of fraudulent misappropriation of the funds of the bank.

See APPEAL: *In criminal cases*; LEGISLATURE: LEGISLATIVE POWERS: *Lord's Days.*

CROWN.

ACTS OF STATE.

WALKER v. BAIRD ET AL.[2]

13. In an action of trespass the defendant pleaded that he was captain of a ship of war, and was employed by command of the Queen to enforce obedience to an agreement entered into between the Queen and a foreign State, and that the acts complained of were committed in the discharge of such duty, and were acts of State, done and performed in carrying out such duty, and that such acts involved the construction of treaties and matters of State, done and performed in carrying out such duty, and that such acts involved the construction of treaties and matters of State which could not be inquired into by the ordinary tribunals of the country:—Held, that the defence disclosed no answer to the action.

1 Isle of Man, rev., 12th February, 1902, 86 L.T.R., 164
2 Newfoundland, aff., 4th August, 1906, 61 J.R., 92

COLONIAL GOVERNMENTS.

WILLIAMS v. HOWARTH.[1]

14. A Colonial Government represents the Crown, and supplies granted by a Colonial Legislature are granted to the Crown as much as supplies granted by the Imperial Legislature.

15. Therefore, where a soldier contracted to serve in a Colonial contingent at fixed rate of pay, and while he was on active service received pay from the Imperial Government, the Colonial Government were entitled to deduct the pay already received by him from the amount due to him from the Colonial Government for his services.

LORD HALSBURY, L.C., page 117:—The learned Acting Chief Justice in giving his judgment in this case, said: "The King has no concern with payments for services rendered in this colony, the obligation is with the Government of New South Wales," and, so far as their Lordships can understand, this is the ground upon which the judgment rests? But with great respect to the learned judge this is entirely erroneous. The Government in relation to this contract is the King himself. The soldier is his soldier, and the supplies granted to His Majesty for the purpose of paying his soldiers, whether they be granted by the Imperial or the Colonial Legislature, are money granted to the King, and the Appropriation Act as passed, simply operates to prevent its being applied to any other purpose: Under these circumstances the money paid was money paid for service rendered to the King, and no other payment could possibly be due upon the contract declared on.

DISMISSAL OF PUBLIC SERVANTS.

SHENTON v. SMITH.[2]

1. A Colonial Government is on the same footing as the Home Government as to the employment and dismissal of servants of the Crown, and in the absence of special contract they hold their offices during the pleasure of the Crown.

2. Where the respondent, having been gazetted, without any special contract, to act temporarily as medical officer during the absence on leave of the actual holder of that office, was dismissed by the Government before the leave had expired, there is no cause of action.

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1 New South Wales, rev., 14th July, 1905. 93 L. T. R., 115; 74 L. J. R., n.s., 115; 21 T. L. Rep., 670.

2 Western Australia, rev., 2nd February, 1895. L. R. 1895 App. Cas., 229. 72 L. T. R., n.s., 130; 64 L. J. R., n.s., 119; 43 W. Rep., 637.

GOULD V. STUART.[1]

3. The Crown has, by law, whether in England or New South Wales, power to dismiss at pleasure either its civil or military officer, a condition to that effect being an implied term of the contract of service, except where it is otherwise expressly provided.

4. But, held that certain provisions of the New South Wales Civil Services Act of 1884, being manifestly intended for the protection and benefit of the officer, are inconsistent with such a condition and consequently restrict the power of the Crown in that respect.

SIR RICHARD COUCH, p. 577:—It is the law in New South Wales as well as in this country that in a contract for a service under the Crown, civil as well as military, there is, except in certain cases where it otherwise provided by law, imported into the contract a condition that the Crown has the power to dismiss at its pleasure: *Dunn* v. *Reg.*[2]; *De Dohse* v. *Reg.*[3]

FORFEITURE.

DE SILVA V. ATTORNEY GENERAL FOR TRINIDAD.[4]

5. Where land has been forfeited to the Crown by regular legal process, the fact that rates have subequently been demanded from, and paid by, persons found in occupation of the land without any title, will not be held to be a waiver of the forfeiture.

GRANT.

LABRADOR COMPANY V. THE QUEEN.[5]

6. The receipt by an officer of the Crown of a fiscal due under a mistake was held not to be a recognition by the Crown effectual for curing a defective title.

7. Where in consequence of erroneous statements as to the effect of a former grant and a recognition by the Crown, a reputation had arisen that a seigniory has existed contrary to the true facts, and an Act of Parliament was passed dealing with

1 New South Wales, aff., 28th July, 1896, L. J., 1896, App. Cas., 575
2 1896, 1 Q. B., 116
3 1896, 1 Q. B., 117, n.s., 7.
4 Trinidad, aff., 26th July, 1898, 79 L. T. R., 130
5 Quebec, aff., 19th November, 1892, 67 L. T. R., 730

such seigniory as existing, and altering its tenure, and defining its extent by a schedule to be drawn up as therein provided: Held, that the Act and schedule were conclusive as to the existence of the seigniory and its boundaries.

PREROGATIVES.

LIQUIDATORS OF THE MARITIME BANK OF CANADA v. RECEIVER GENERAL OF NEW BRUNSWICK.[1]

8. The prerogative of the Crown, when not expressly limited, by local or statute, is as extensive in the Colonial Possessions of the Crown as in Great Britain.

9. The British North America Act, 1867, in no respects curtails the rights and privileges of the Crown, or affects the relations subsisting between the Sovereign and the several Provinces of the Dominion; and the revenues of each Province continue to be vested in the Sovereign as head of each Province, subject to the disposal and appropriation by the Provincial Legislature; and the Crown as a simple contract creditor for the public moneys of the Province deposited with a bank, is entitled on liquidation to priority over other creditors of equal degree.

LORD WATSON, 76:—The Supreme Court of Canada had previously ruled, in *The Queen v. The Bank of Nova Scotia*,[2] that the Crown, as a simple contract creditor for public moneys of the Dominion deposited with a Provincial Bank is entitled to priority over other creditors of equal degree. The decision appears to their Lordships to be in strict accordance with constitutional law. The property and revenues of the Dominion are vested in the Sovereign, subject to the disposal and appropriation of the Legislature of Canada; and the prerogative of the Queen, which has not been expressly limited by local law or statute is as extensive in her Majesty's colonial possessions as in Great Britain. In *The Exchange Bank of Canada v. The Queen*,[3] this board disposed of the appeal on that footing, although their Lordships reversed the judgment of the Court below, and negatived the preference claimed by the Dominion Government, upon the ground that, by the law of the Province of Quebec, the prerogative was limited to the case of the common debtor being an officer liable to account to the Crown for

1 Supr. C. Canada, New Brunswick, aff., 2nd July, 1892, 61 L.J.R. n.s., 75; 8 L.T.L. Rep., 677.
2 11 Supr. Court Rep. 1.
3 55 L.J.R. P.C. n.s., 5; Law Rep., 11 App. Cas., 157.

public moneys collected or held by him. The appellants did not impeach the authority of these cases, and they also conceded that, until the passing of the British North America Act, 1867, there was precisely the same relation between the Crown and the Province which not subsists between the Crown and the Dominion. But they maintained that the effect of the statute has been to sever all connection between the Crown and the Provinces; to make the Government of the Dominion the only Government of Her Majesty in North America; and to reduce the provinces to the rank of independent municipal institutions. For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority.

Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the Provinces. The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the Provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the Provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of the Provincial Government. But in so far as regards those matters which, by section 92, are specially reserved for provincial legislation, the legislation of each Province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. In *Hodge v. The Queen*,[1] Lord Fitzgerald, in delivering the opinion of this Board, said: "When the British North America Act enacted that there should be a Legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Provinces and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its powers possessed and could bestow. Within these limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion." The Act places the constitutions of all provinces within the Dominion on the same level; and what is true

[1] 53 Law J. Rep. P. C. 1; Law Rep. 9 App. Cas. 117

with respect to the Legislature of Ontario has equal application to the Legislature of New Brunswick.

It is clear, therefore, that the Provincial Legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the Provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share.

In asking their Lordships to draw that inference from the terms of the statute, the appellants mainly, if not wholly, relied upon the fact that, whereas the Governor-General of a Province, is appointed, not by Her Majesty, but by the Governor-General who has also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument which, if pushed to its logical conclusion, would prove that the Governor-General, and not the Queen, whose Vice-roy he is, became the sovereign authority of the province whenever the Act of 1867 came into operation.

But the argument ignores the fact that, by section 58, the appointment of Provincial Governor is made by the Governor-General in council by instrument under the Great Seal of Canada, or, in other words, by the Executive Government of the Dominion, which is, by section 9, expressly declared "to continue and be vested in the Queen." There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The Act of the Governor-General and his council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of Provincial Government, as the Governor-General himself is for all purposes of Dominion Government.

The point raised in this appeal, as to the vesting or non-vesting of the public property and revenues of each province in the Sovereign as Supreme head of the state, appears to their Lordships to be practically settled by previous decisions of this Board.

The whole revenues reserved to the Provinces for the purposes of Provincial Government are specified in sections 109 and 126 of the Act. The first of these clauses deals with "all lands, mines,

minerals and royalties belonging the several Provinces of Canada: Nova Scotia and New Brunswick at the Union," which it declares "shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise." If the Act had operated such a severance between the Crown and the provinces as the appellants suggest, the declaration that these territorial revenues "should belong to the provinces would hardly have been consistent with their remaining vested in the Crown." Yet, in *The Attorney-General of Ontario* v. *Mercer*,[1] *St. Catherine's Milling and Lumber Company* v. *The Queen*,[2] and *The Attorney-General of British Columbia* v. *The Attorney-General of Canada*,[3] their Lordships expressly held that all the subjects described in section 109, and all the revenues derived from these subjects, continued to be vested in Her Majesty as the Sovereign head of each province. Section 126, which embraces provincial revenues other than those arising from territorial sources, and includes all duties and revenues raised by the province in accordance with the provisions of the Act, is expressed in language which favours the right of the Crown, because it describes the interest of the provinces as a right of appropriation to the public service. And seeing that the successive decisions of this Board, in the case of territorial revenues, are based upon the general recognition of Her Majesty's continued sovereignty under the Act of 1867, it appears to their Lordships that so far as regards vesting in the Crown, the same consequences must follow in the case of provincial revenues which are not territorial.

RE MOSELLY.[4]

10. The prerogative of the Crown extends to the remission of all sentences of a punitive character, and the Governor of the Colony has power under his commission to exercise the Royal prerogative in that respect.

See APPEAL: *Costs in cases with the Crown*; CORPORATION (*Company*): *Surrender of right to Crown*; LICENSE: *Granting of License*; PRIVILEGE: *Eod. ro.*; SALVAGE: *Property of the Crown.*

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1 52 Law J. Rep. P. C. 84; Law Rep. 8 App. Cas. 767.
2 58 Law J. Rep. P. C. 59, Law Rep. 14 App. Cas. 46.
3 58 Law J. Rep. P. C. 88, Law Rep. 14 App. Cas. 295.
4 Bahama Islands, [illegible] 2nd February, 1893, 58 L. T. R., n.s., 105.

CROWN LANDS.

CONCESSIONS BY THE CROWN.

NEW TRINIDAD LAKE ASPHALT COMPANY v. ATTORNEY GENERAL.[1]

1. A restrictive covenant by the Crown contained in its deed of concession affected certain lands situate within three miles of the subject of concession "which now are, or any time during the said term shall come into, the possession of Her Majesty."

2. In an action by the appellants for injunction and damages in respect of a breach of the said covenant by the Government:

3. It was held that on its true construction it related only to lands in the actual possession, and did not include lands which were merely subject to the control, of the Crown irrespective of the Crown having done anything with respect to the use or occupation of them.

EXCLUSIVE RIGHT TO FISH.

CAGNON v. THE ATTORNEY GENERAL OF QUEBEC.[2]

4. The appellant, as grantee of the lands in suit from the French king, "with all the fishing and hunting and other rights and privileges which the vendor had or might have as seignior, or along its frontage on the seashore," claimed the exclusive right to fish salmon from the foreshore along their boundary:

5. Held, that on the true construction of the grant, the claim could not be sustained. The above clause was ineffectual to pass the exclusive use of the foreshore so far as fishing is concerned.

LORD ROBERTSON, p. 513:—The question is therefore reduced to a very general one, which is quite settled in the law of Canada, and that is, what is the meaning of the words "avec droit de chasse, pêche et traite avec les sauvages dans toute l'étendue de la dite concession." The effect of such a grant is defined in a passage cited in the judgment under review, and the soundness of the law so laid down is not impugned by the appellant. "Le droit de pêche formait partie du fonds commun de la colonie, mais sous la garde du roi, pour l'avantage de tous, et ne pouvait devenir exclusif

1 Trinidad and Tobago, 8th June, 1904, L. R., 1904, App. Cas., 415.
2 Quebec, 1907, 16 L. R., App. Cas., 1907, p. 511.

sans quelque concession spéciale exprimée dans des termes [illegible] formels que ceux qui se trouvent dans la simple formule [illegible] tronnée plus haut," and the "simple formula," in that case, was exactly that which is now under consideration. While the question is thus discussed under somewhat abstract terms, it is [illegible] remembered that the exclusive right claimed (and never [illegible]) implies a grant by the Crown to the exclusive use of the foreshore so far as fishing is concerned. All the arguments offered to their Lordships about the relative importance of fishing and land in such cases as the present were fully in view (and at less distance of time) of the Canadian jurists who have thus stated and developed the law. The appellant received no support from the Canadian Courts, and their Lordships are entirely unable humbly to advise His Majesty otherwise than that this appeal should be dismissed.

POSSESSION.

GLENWOOD LUMBER COMPANY v. PHILLIP.[1]

A license granted by the Government to the respondent in pursuance of sect. 51 of c. 13 of the Consolidated Statutes of Newfoundland (2nd series), giving an exclusive [illegible] of occupation of land though subject to reservation or to a restriction as to its user, is in law a demise of land.

7. Prior to its grant the appellants, expecting and believing that they would obtain the license, commenced cutting timber on the land comprised therein, and continued to do so until three days after its grant, notwithstanding a formal notice from the respondent; and after that date they removed the logs so cut:

8. It was held that the appellants were wrong-doers, and that the respondent as lessee had lawful possession of the logs so cut, which established a good title against the appellants with a right to consequent relief (that is to the value of the logs removed without deducting the expenses of the said wrongful acts so far as agreed).

LORD DUNEDIN, p. 410: The respondent, on the other hand, was, in their Lordships' opinion, lessee and occupier of the lands, and, as such, had lawful possession of the logs which were on the land. It is a well-established principle in English law that possession is good against a wrong-doer, and the latter cannot set up a *jus tertii* unless he claims under it. This question has been exhaustively discussed by the present Master of the Rolls in the recent case of *The*

1 Newfoundland aff., 14th May 1904, 1. R., 1904, App. Cas., 405

Winkfield.[1] In *Jeffries v. Great Western Ry. Co.*,[2] Lord Campbell is reported to have said: "I am of opinion that the law is that a person possessed of goods as his property, has a good title as against every stranger, and that one who takes them from him having no title in himself is a wrong-doer, and cannot defend himself by showing that there was title in some third person, for against a wrong-doer possession is title." The Master of Rolls, after quoting this passage, continues: "Therefore it is not open to the defendant, being a wrong-doer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner, cannot come into the discussion at all, and therefore, as between those two parties, full damages have to be paid without any further inquiry." Their Lordships do not consider it necessary to refer at any greater length to the reasoning and authorities by which the Master of the Rolls supports this conclusion, and are content to express their entire concurrence in it.

Van Deiman's Land v. Marine Board of Table Cape.[3]

9. Previous users of lands which are the subject of a Crown grant is evidence, where the language of the grant is not unambigious in itself, of the extent of the grant, though not evidence of possession adverse to the Crown or of a lost grant; and where such evidence has been rejected a new trial will be ordered.

10. Contemporanous exposition is not confined to user under the instrument; all circumstances which can tend to show the intentions of the parties may be relevant.

11. The lease of part of a jetty which was leased and extended over the foreshore held to be evidence of seisin in the *locus in quo*, and not merely evidence of an easement.

Earl of Halsbury, L.C., p. 30:—The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it; and when the obvious intention is to give a title to what has been taken and retained before the actual grant, it is manifest that what has been so taken and retained is cogent evidence of what is granted. When evidence of this character has been practically withdrawn from the jury, it is impossible to allow the verdict thus obtained to stand.

The circumstances under which modern user may be proved to explain a written instrument are treated of with great precision by

1 (1902) p. 42.
2 (1856) 5 E. & B. 802, at p. 805.
3 Tasmania, rev., 4th December, 1905, 75 L. J., P. C., n.s., 28.

the learned judges who advised the House of Lords in *Waterpark v. Fennell*.[1]

The learned judge stated, and stated quite correctly, that you cannot say that act of user under a grant when they were done before the grant existed. It does not follow that such acts were not relevant to be proved when, as in this case, they lead up to and explain what is afterwards granted.

It would be a singular application of the maxim quoted by Coke, 2 *Institutes*, 11, *contemporanea expositio est fortissima in lege* to suggest that the proof of user must be confined to ancient [illegible] ments, whatever the word "ancient" may be supposed to mean. The reason why the word is relied on is because the user is supposed to have continued, and thus to have brought us back to the contemporaneous exposition of the deed.

The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to show the intentions of the parties, whether before or after the execution of the deed itself, may be relevant, and in this case their Lordships [illegible] very relevant to the questions in debate.

EMMERSON v. MA[illegible]

12. The Statute 21 Jac. 1, c. 14, deals only with procedure and does not confer upon an intruder any right of possession or interest in Crown lands. Therefore, where an intruder has been in occupation of Crown lands for more than twenty but less than sixty years:

13. It was held that the Crown could make a valid grant of such lands to another person, and that the intruder could not maintain an action of ejectment against the grantee.

SIR ALFRED WILLS, p. 569:—The plaintiff had no title to the land, and was a mere trespasser upon it. A plaintiff in ejectment must recover on the strength of his title, and assuming in his favour that evidence of uninterrupted possession for many years, unanswered and unqualified by any other circumstances would have entitled him to succeed, the moment that it appeared that the land belonged to the Crown and had not been occupied adversely to the Crown for sixty years, the presumption of ownership from occupation was gone, and as occupation for a period of less than sixty years can avail nothing against the Crown, it would have been shown that the possession, as well as the right, had always been in the Crown, notwithstanding the occupation of the plaintiff and his predecessors in title. Still more was the plaintiff's case answered

1 1859, 7 H. L. C., 650.

2 Supr. C., Canada, aff., 27th July, 1906, 95 L. T. Rep., 568; 75 L. J., P. C., n.s., 109.

when the grant of the Crown to the defendant and his peaceable possession were shown. Nothing can be better settled than that, if a person having title can get into possession of land in the actual occupation of a person having no title, he may continue such possession, and that the person who was in actual occupation cannot succeed in a judgment against him on the strength merely of his own [illegible] occupation. The presumption of title which arises [illegible] possession is answered, and the person who [illegible] cannot succeed against the person who has both [illegible] possession.

RESERVE FOR MILITARY PURPOSES.

ATTORNEY GENERAL FOR BRITISH COLUMBIA v. ATTORNEY GENERAL FOR THE DOMINION OF CANADA.[1]

14. Where it appeared from the evidence that, as a fact, land in a colony had been reserved by the Crown for military purposes:

15. It was held, that it remained Imperial property at the time of the passing of the British North America Act, 1867, and did not fall to the colony by virtue of sect. 117 of the Act, nor to the Dominion of Canada by virtue of sect. 108.

RESERVE OF MINES AND MINERALS.

ESQUIMAULT AND NANAIMO RAILWAY CO. v. BALLENDAGE.[2]

6. A grant of lands, "including all mines, minerals, and substances whatsoever thereupon, therein, and thereunder," is limited to such minerals and substances as are incidents of land and pass with the freehold, and does not include gold and other metals in the lands, which are the property of the Crown under its prerogative title.

LORD WATSON, p. 112:—The appellants' company, whilst admitting that apt and precise language is necessary in order to alienate the prerogative rights of the Crown, reply upon the enumeration of minerals which is coupled with the grant of lands in sect. 3, as sufficient to show the intention of the Provincial Legislature to transfer to the Dominion Government their right to administer the precious metals in these lands. The words relied on are, "including all coal, coal oil, ores, stones, clay, marble slate, mines,

[1] British Columbia, aff. 2nd August 1906, 95 L. T. Rep. 571; 22 L. T. Rep. 64; L. J. P. C., n. s., 114.

[2] British Columbia, aff. 28th July, 1896, 75 L. T. R. 111; L. J. R., n. s., 98.

minerals and substances whatsoever thereupon, therein, and thereunder." The only expression occurring in that enumeration which can possibly aid the argument of the appellant company are "mines, minerals and substances," not one of these expressions can be rightly described as precise, or, in other words, as necessarily including the precious metals. According to the usual rule observed in the construction of the concluding and general items of a detailed enumeration, they may be [illegible] to signify alia similia with the minerals or substances which are incidents of the lands, and pass with the freehold.

Calgary and Edmonton Railway Company v. The King.[1]

17. The enactments and regulations relating to Crown lands reserved for sale of homesteads has no application to lands granted by way of subsidies for public works.

18. Patents issued for land to be granted to a railway company by way of bounty or subsidy, under a special Act and Order in Council which contained no reference to mines and minerals, were not subject to the regulations of 1884 made under the Dominion Lands Act, 1886, and should be free from any reservation of mines or minerals, except gold and silver.

RESERVE OF WATERCOURSE.

Romeret v. Surveyor General [illegible]

19. The reservation in a grant of lands by a Colonial Government that the land should be liable to have water-course made over any part of it without compensation to any proprietor or lessee, includes in the absence of any other source of supply the right to divert water from a natural stream on the land into the water-course so made.

Lord Davey, p. 73: It has been argued [illegible] make a water-course does not authorise the abstraction of water from the natural stream flowing in the appellant's land, and also that it is not proved that the water-course No. 3 was made by order of the Colonial Government. It is to be observed that the first point is not referred to in the judgment delivered by the Chief Justice and apparently was not taken in the Court below. Their Lordships are of opinion that it cannot be maintained. It cannot

1 Supr. C. Canada, Main [illegible] August 1904, 73 L. T. R., 61; 73 L. J. R. [illegible] 111, 20 [illegible] L. Rep. 7[illegible]
2 Natal 16th J. [illegible] 1896, 6 [illegible] L. R. [illegible] 72

be denied that a "water-course" may mean, and perhaps the more natural meaning of it is, a channel in which water flows, and that the grant of right to make a water-course may include the right to fill it with water, and use the water flowing in it when made.

SWAMP LANDS.

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.[1]

20. By section 4 of the Revised Statutes of Canada, 1886, c. 47, s. 4: "All Crown lands in Manitoba which are shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the Province, and enure wholly to its benefit and uses:" Held, that such lands became vested in the province not from the date of the statute, but from that of actual transfer.

See LEGISLATURE: *Public Lands, Swamp lands.*

CUSTOM'S TARIFF.

EXEMPTION ON RAILS.

TORONTO RAILWAY COMPANY v. REGINA.[2]

1. The exemption from duty in item 173 of section 2 of 50 & 51 Vict., c. 39 accorded to "steel rails weighing not less than twenty-five pounds per lineal yard for use in railway tracks" extends to all steel rails of the specified weight, whether used for railways in the ordinary sense of the word or for tramways, the term "railway track," by the usage of the Canadian draftsmen, being equally applicable to both.

IMPORTATION IN CANADA.

CANADA SUGAR REFINING CO. v. THE QUEEN.[3]

2. Goods are "imported into Canada" within the meaning of sect. 4 of the Customs Tariff Act 1894, when they are landed and delivered to the importer or to his order, or when they

1 [illegible] 1904 73 L J R [illegible] 100

[illegible] 1896 65 L J R [illegible] 110

[illegible] L T R 146 [illegible] L T R, [illegible] 14 T L R [illegible] 545

are taken out of the warehouse, if they are placed in bond, and not when the vessel enters a port of call on her way to her ultimate destination.

REFINING

COLONIAL SUGAR REFINING COMPANY v. ATTORNEY GENERAL OF VICTORIA.[1]

3. A process which simply removes foreign impurities from an article without producing any change in the article itself is not a process of refining for the purpose of differential duties as between the refined and the unrefined article.

See STATUTE: *Construction. Duty on rail. Tariff Act*; SHIP AND SHIPPING: *Eod. vis.*

1 Victoria, rev., 13th June, 1901, 70 L. J. R., n.s., 75

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DAMAGES.

BY LESSEE UNDER A LEASE WITH PROMISE OF SALE.

Kieffer v. Le Séminaire de Québec.[1]

1. Wh[illegible] defendants' land, being in possession thereof and having a contract for future purchase contained in his lease, raised for the purpose of building operations for his own benefit, and not as mandatory of the defendants, the lower part of the leased land with the effect of diverting [illegible] land, and thereby causing him damage [illegible] would otherwise have been discharged [illegible] land.

[illegible] the lessee and an [illegible] ser[illegible]

LORD DAVEY, p. 96:—It is quite true, as the learned Chief Justice says, that "the action is in its nature an 'action negatoire,' and consequently a real action which ought to be taken against the actual holder of a dominent tenement" for the purpose (that is) of negating the pretended servitude and establishing the consequent right to the cessation of its exercise. But [illegible] the measure or extent of the relief to which the [illegible] as against the defendants or the question whether [illegible] the [illegible] pretended servitude discontinued [illegible] other than work required to be done at the expense of the defendants [illegible] right to enter upon the defendants' land and [illegible] do what is necessary for the purpose. The answer to the [illegible] must depend on the enactments of the French law, [illegible] which the Quebec Code is founded.

It [illegible] the reason [illegible] the Quebec Code nor the Code Napoleon contain [illegible] point. Art. 501 of the Quebec Code [illegible] speaks [illegible] art. 640 of the Code Napoléon) provides as follows:—

"Lands on [illegible] of a higher level to receive the waters [illegible] without the agency of man. [illegible] proprietor [illegible] and [illegible] not raise any [illegible] prevent [illegible] flow. [illegible] of the higher land [illegible] lower land."

Amongst the authorities which [illegible] Code as the foundation of the article, Pothier [illegible] Sénéchaussée du Poitou, [illegible] obligations que forme le voisinage [illegible]

"[illegible] demandeur [illegible] ouvrage que la cause du propriétaire [illegible] aux frais du défendeur, si c'est [illegible] fait, ou de quelqu'un dont il soit [illegible] autre chose qu'à souffrir la destruction [illegible] demandeur. *Si ipse [illegible] dum; si alius qui ad me non pertinet [illegible] quod autem is sui haeres suus fecit, perinde est ac si ipse [illegible]. L. 6, § 7, ff. eod. tit.*" The reference to Pothier's Latin quotation is *Digest* 39.3. *de [illegible]*.

In like manner *Dalloz*, [illegible] in the Code Napoléon (*Répertoire [illegible] Servitude*" *art.* 101, *ed.* 1859, *vol. xi, p.* 83), says:

"La démolition des ouvrages nuisibles [illegible] inférieur est aux frais du propriétaire [illegible] Dans [illegible] présumé l'auteur. Il ne serait tenu que [illegible] ouvrage émanait d'un tiers.

It is unnecessary for their Lordships to comment on the numerous other text-writers who are referred to by Dalloz, J., or were quoted by counsel in the course of the argument. Their Lordships

cannot hold that Bellew was acting under the control or direction of Le Séminaire, or in the circumstances that the latter is responsible for his acts.

With regard to the claim for damages against Le Séminaire, the short but sufficient answer is that given by Lacoste, C.J.: "Damages can result only from a fault; this is a personal demand which ought to be made against the author of the fault."

The learned counsel for the appellant Kieffer quoted cases which have been decided in the Canadian Courts against owners of buildings for damage occasioned by some want of repairs or fault of construction, but they turned upon the express provision for such cases in art. 1055 of the Code, and have no bearing on the present case. The result is that Kieffer, so far as his claim for the cessation of the pretended servitude and for damages is concerned, has sued the wrong person; but this judgment will not preclude his taking any proceedings against Bellew or anybody else which may be still open to him.

JOINDER OF CAUSES.

PENINSULAR CO. v. TSUNE KIJINA ET AL.[1]

3. In a suit under Lord Campbell's Act numerous plaintiffs sought to recover separate damages as due to each plaintiff or group of plaintiffs for injuries resulting from a maritime collision alleged to have been caused by the negligence of the appellants:—It was held, that there was no authority expressed in or to be implied from the rules of Court to warrant the joinder in one suit of different and distinct causes of action not being causes of action by and against the same parties. *Smurthwaite v. Hannay.*[2]

MALICIOUS PROSECUTIONS.

BANK OF NEW SOUTH WALES v. PIPER.[3]

4. By a Colonial statute the sale or delivery of wool subject to a registered lien without the written consent of the license "with a view to defraud" is made a punishable offence: in words immediately following, the sale of cattle subject to a statutory mortgage without such written consent is made penal, and the words "with a view to defraud" are omitted.

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1. Supr. Ct. of China and Japan, rev., 20th July, 1895, L. R., 1895 App. Cas. 661.

2. 1894 App. Cas. 494.

3. New South Wales, 1st May, 1897, 66 L. J. P. C. n.s., 73.

5. In an information for such sale of cattle, the respondent was committed for trial, but the Crown refused to prosecute. The respondent thereupon brought an action for malicious prosecution in which he swore that he had obtained the verbal consent of the appellants; but this the appellants denied. The jury found a verdict in favour of the respondent, and awarded damages. The Supreme Court discharged a rule for a new trial or for a non-suit or verdict for the appellants:—

6. The intent to defraud was not a necessary element in the statutory offence charged, and the order of the Supreme Court must be discharged, and a verdict for the appellants made absolute, with costs.

SIR RICHARD COUCH, p. 76:—It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common-law or statutory, there must be *mens rea* on the part of the accused, and that he may avoid conviction by showing that such *mens rea* did not exist. That is a proposition with their Lordships do not desire to dispute; but the question whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations. In case when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved; on the other hand, the absence of *mens rea* really consist in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent. The case of *Sherras* v. *De Rutzen*,[1] where the conviction of a publican for the offence of selling drink to a constable on duty was set aside by the Court because the accused believed, and had reasonable grounds for the belief, that the constable was not on duty at the time is an illustration of its absence.

KING v. HENDERSON.[2]

7. The motive of a party who commences proceedings before the court, however reprehensible, is not enough to make it an abuse of process or a fraud upon the court, unless it be shown that the remedy would be unsuitable, and would enable the person obtaining it fraudently to defeat the rights of others.

LORD WATSON, p. 491.—Their Lordships did not dispute the soundness of the proposition that a plaintiff or petitioner who in-

1 64 L. J. Q. B. M. C., 218 (1895) I Q B, 918
2 New South Wales, aff., 25th June, 1898 14 T. L. Rep., 490

stituted and insisted in a process before the bankruptcy or any other court in circumstances which made it in [illegible] of the remedy sought or a fraud upon the Court, could not be said [illegible] in that proceeding either with reasonable [illegible] But in using that language it became necessary [illegible] would, in proper legal sense of the words, be sufficient to constitute what was generally known as an abuse of process or as fraud upon the Court. In the [illegible] reprehensible, would not [illegible] sufficient for that purpose [illegible] shown that [illegible] which the [illegible] Court was sought, the remedy [illegible] able the person [illegible] fraudently [illegible] of others. Citing [illegible] and *ex parte Harcourt*,[1] [illegible] Lordships went on to say that motive could not in itself constitute fraud, although it might incite the person who entertained it to adopt proceedings which, if successful, would necessarily lead to a fraudulent result, and it was not the motive but the course of procedure which lead to that result, which the law regarded as constituting fraud. In *ex parte Davis*,[4] the Court of Appeal refused to make an adjudication in bankruptcy where it was clearly shown that the proceeding had been used and was meant to be used for the illegitimate and fraudulent purpose of extorting money from the debtor. And again in *ex parte Griffin*,[5] the same Court, although there was a good petitioning creditor's debt and an act of bankruptcy had been committed, refused to make an adjudication. The ratio of the decision was thus explained by Lord Justice James: "I think I never knew a case so [illegible] with which the whole thing was conceived [illegible] oppression which it was intended to exercise. It would [illegible] thing for any Court of Justice in a civilized [illegible] the instrument of proceedings like these." [illegible] appellant argued, with great plausibility that [illegible] of a case like the present, involving the inquiry [illegible] proceedings complained of were taken without reasonable and probable cause, it was within the province of the jury, and not of the judge, to find the facts upon which the question of probable cause depended, and that it was for the judge, upon those facts to determine the question of law. The rule was so laid down by the House of Lords, in *Lister* v. *Perryman*.[6] Their Lordships admitted the propriety and cognency of the rule in any and every case where the facts admitted of its application.

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1 Rose, 424

2 Maddock, 1

3 Rose, 203

4 Ch. Div., 461

5 12 Ch. Div., 480

6 4 E and I, ap. 521

Cox v. English, Scottish, and Australian Banks[1]

8. In an action for malicious prosecution, the *onus* is on the plaintiff throughout of establishing to the satisfaction of the judge who tries the case that there was no reasonable or probable cause for instituting the prosecution. But in a case in which the judge at the trial improperly left the question of reasonable or probable cause to the jury, instead of dealing with it himself on the facts found by the jury, and the jury found upon the facts that there was no reasonable and probable cause, if the court is of opinion that there was no evidence to support this finding, or that it was against the weight of evidence, there must be a new trial.

Lord Davey, p. 184:—The principles applicable in these cases have been laid down for the English courts in the case of *Abrath v. North-Eastern Railway Company*,[2] in which Bowen, L.J. said: "This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff have to prove, first that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause; or, as it may be otherwise stated, that the circumstances of the case were such as to be, in the eyes of the judge, inconsistent with the existence of reasonable and probable cause; and lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is from an indirect and improper motive, and not in furtherance of justice." Later on he says: "Now, in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable and probable cause for instituting it.

MEASURE OF

Trent Scoughton v. Barbadoes Water Supply Co.

9. A colonial Act gave the respondent company power to require lands or streams for the purposes of their undertaking upon making compensation to the person whose property was affected.

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1 Queensland, aff., 23rd February, 1905, 9 L. T. R., 483; 11 J. R., n.s., 62.

2 49 L. T. Rep., 618; 11 Q. B. Div., 440, aff. on appeal; 55 L. T. Rep., 63; 11 App. Cas., 247.

3 Barbadoes, rev., 30th June, 1898, 69 L. T. R., page 161.

10. The company, in exercise of their powers, abstracted certain streams of water from property of the appellant.

11. The damages or loss which the appellant had sustained was in being deprived of the power of using the property which was his, and the measure of the compensation was the value of his interest in the streams, considering the possibility of his making use of them in the future though he had previously made no pecuniary benefit from them.

LORD HALSBURY, p. 165:—Their Lordships are of opinion that the question was what was the value of the interest of the appellant in the stream, it being conceded that in the exercise by the respondent upon them by the Act those streams had been abstracted and that the appellant had been deprived of the power of exercising the right which he had up to that time possessed in respect of them. That is "damage or loss" within the meaning of the Act. Though he never had up to that time obtained one farthing for the use of the streams and might never have made any use of them, nevertheless the damage or loss which he sustained was that he was deprived of the power of using the property which was his.

MISTAKE IN TELEGRAPHIC CODE.

FAICK v. WILLIAM[1]

12. Where parties have corresponded by means of a telegraphic code: it is for the plaintiff, in an action for breach of contract, to shew that the proposal made by him and accepted by the defendant is so clear and unambiguous that the defendant cannot be heard to say that he misunderstood it. It is not a matter for the Court to construe.

NEGLIGENCE.

DUMPHY v. THE MONTREAL LIGHT HEAT AND POWER COMPANY.[2]

13. A company was authorized by statute to enter upon and construct under or over the streets and public highways of a town all such pipes, conduits, and other constructions as might be necessary for the purposes of its business, all such work to be performed under the directions of the municipality provided that the company should be responsible for all damages which it might occasion.

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1 New South Wales, aff., 9th December, 1899, L. R., 1900, App. Cas., 177.
2 Quebec, aff., 31st July, 1907, 23 T. L. R., 770

14. The company erected overhead wires which were not insulated or protected by guard wires, and a building contractor, while engaged in building operations, brought a derrick in contact with the overhead wires, with the result that a current of electricity was diverted to the street and killed a passer-by. In an action by his widow to recover damages owing to the company's negligence, first, in having overhead and not underground wires; and secondly, in not having them insulated or guard wires put round them, the jury found for the plaintiff.

15. Held, that as the statute authorized overhead just as much as underground wires, it was not negligence to have them overhead; and that the evidence did not show that insulating the wires or putting guard wires round them would have been an efficient remedy.

NON-NATURAL USER.

EASTERN AND SOUTH AFRICAN TELEGRAPH COMPANY v. CAPE TOWN TRAMWAYS CO.[1]

16. The principle that an owner, even apart from wilfulness or negligence, who brings on his land something which is itself dangerous and may become mischievous if not kept under control, is liable to a neighbour who is damaged thereby, is not inconsistent with the Roman Dutch law of the Cape Colony, but cannot be so extended as to impose liability when the injury done is in part the consequence of the neighbour's using his own property in a manner which creates susceptibility to the damage done.

17. Disturbances were caused in the working of the appellant's submarine cable by electricity stored by the respondents for the propulsion of their tramcars which had from time to time left the tramway system and caused pecuniary loss to the appellants. There was no defect in the respondents' apparatus, and the escape was the necessary result of its working in accordance with the statutory powers of the respondents: Held, that the respondents were not liable in damages to the appellants, the escape not being a "leak," which under their Act the respondents were called upon to remedy.

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1 Cape of Good Hope, aff., 18th April, 1902, 71 L.J.R., n.s., 122; 50 W. Rep., 657.

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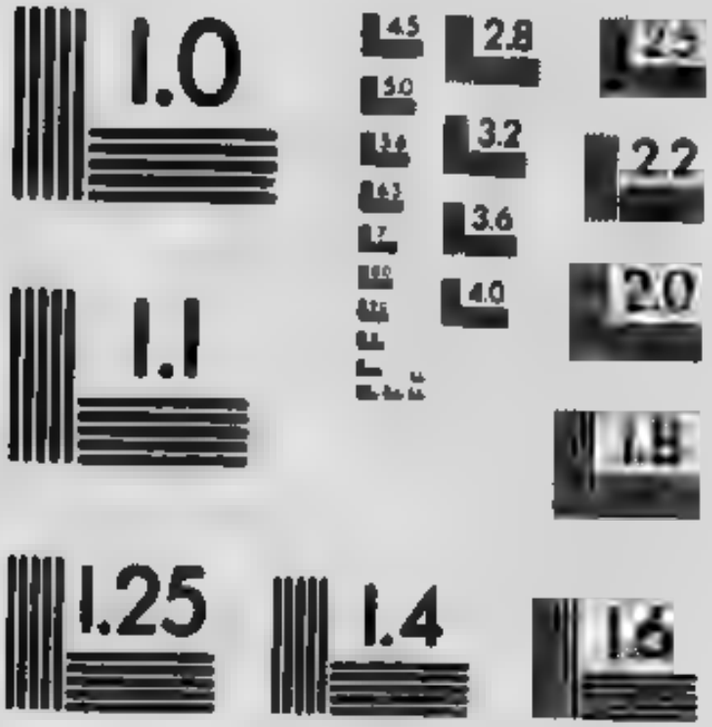

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POWERS GIVEN BY LEGISLATURE.

CANADIAN PACIFIC RAILWAY V. PARKE ET AL.[1]

18. Where the Legislature has authorised a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law, permissive, not imperative, the Legislature must be held to have intended that the use sanctioned is not to prejudice the common law rights of others.

19. The respondents had power under the British Columbian legislation to divert water from its natural channel for the purpose of irrigating their lands, which was necessary for their proper cultivation. They took no steps to carry off the surplus water, and the natural percolation of the water so brought upon their lands injuriously affected adjacent lands of the appellants lying at a lower level.

20. This privilege of irrigating their own land with foreign water was not meant by the Legislature to be imperative, and was not intended to exclude all right of action by neighbouring proprietors for injury done to their lands, except in the case of negligence.

LORD WATSON, p. 131:—The real question, therefore, in the case comes to be, whether these provisions ought to be construed, as being in their substance, as well as in their form, permissive merely, and subject to the obligation, which, in that case is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or, whether they are to be construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of negligence, to inflict any amount of injury upon his neighbour without incurring responsibility. The respondents contended for the second of these alternatives which has been adopted by the courts below, but, in order to justify their contention, it is incumbent upon them to show that the Legislature deliberately intended to take away the rights of individuals to protect their property against invasion. The respondents maintain that, so long as they are not negligent, privilege for the consequences of which they are not responsible of causing by means of their irrigation, a landslip which will have the ultimate effect of carrying the lands situated at a lower level than their own, together with all erections upon them, whether consisting of houses or railways, into the Thompson river. Their Lordships have been unable to discover, in the statutory provisions submitted to them, any sufficient ground for holding that the privilege of irrigating his own

1 British Columbia, rev. 17th June, 1899, 81 L. T. R., 127; 15 T. L. Rep., 427.

soil with foreign water meant by the Legislature to be imperative, and was intended to exclude all right of action by neighbouring proprietors for injury done to their lands, save in the case where such injury was occasioned by the negligence of the irrigator.

CANADIAN PACIFIC RAILWAY v. ROY[1]

21. A railway company authorised by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for the injury not caused by negligence, but by the ordinary and normal use of its railway; or in other words, by the proper execution of the power conferred by the statute.

22. The previous state of the common law imposing liability cannot render operative the positive enactment of a statute. Neither the civil Code of Lower Canada, art. 356, nor the Dominion railway Act, ss. 92, 288, on their true construction contemplates the liability of a railway company acting with its statutory powers:—

23. So held, where the respondent had suffered damages caused by sparks escaping from one of the appellant's locomotive engines while employed in the ordinary use of its railway.

LORD CHANCELLOR, page 228: The serious and important question sought to be raised in this appeal is whether the railway company, authorized by statute to carry on their railway undertaking in the place and by the means that they do carry it on, are responsible in damages for injury not caused by negligence, but by the ordinary and normal use of their railway.

Both courts below have held that in the Province of Quebec the railway company is so responsible, and the question is whether that is the law.

The argument appears to be founded on the suggestion that Quebec has a civil law of its own, and that in that province all corporations like all other persons are responsible for causing templated by the Legislslature, and that cannot constitute an action-wrong, whether imprudence or want of skill; and another article of the code provides that civil corporations, constituting by the fact of their incorporation ideal or artificial persons, are as such governed by the laws affecting individuals, saving the privileges they enjoy and the disabilities they are subjected to.

If the immunity claimed for the appellants were simply claimed upon the ground that they were a corporation, without reference to

1 Quebec, rev., 18th December, 1901, L. R., 1902, App. Cas., 220; 86 L. T. R., 127; 71 L. J. R., n.s., 51; 50 W. Rep., 415; 18 T. L. Rep., 291

what they are authorized to do in that capacity, the argument would be well founded; but the fallacy of the suggestion lies in supposing that that immunity is claimed because they are a corporation. If it were so, there would be no difference between the law of England and the law as so expounded in the Province of Quebec; but the ground upon which the immunity of a railway company for injury caused by normal use of their line is based is that the Legislature, which is supreme, has authorized the particular being so done in the place and by the means contemplated by the Legislature, and that cannot constitute an actionable wrong in England any more than it cannot constitute a fault by the Quebec Code. The principle has been lucidly expounded by Lord Hatherly in the case of *Geeddis* v. *Proprietors of Bann Reservoir*[1] thus:—

"If a company, in the position of the defendant there,[2] has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers.

My Lords, I say the proper mode of executing those powers, because it appears to me that it is very neatly and appositely put by Mr. Baron Fitzgerald, in giving his judgment in the Court of Exchequer Chamber, in this form. Mr. Baron Fitzgerald says:—

"The substantial question raised on the pleadings in the first and second counts of the declaration, appears to me to be whether these acts of the defendants were done in a due exercise of their authority, under the local and personal statute which has been mentioned, without negligence."

And Lord Cairns, in the case of *Hammersmith Ry. Co.* v. *Brand*,[3] points out that it would be a repugnant and absurd piece of legislation to authorize by statute a thing to be done and at the same time leave it to be restrained by injunction from doing to every thing which the Legislature has expressly permitted to be done. Lord Cairns said:—

"It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken, I think, from the state-

1 3 App. Cas., 438.

2 Cracknell v. Corporation of Thetford, L. R., 4 C. P., 629; App. Cas., 1902, 629.

3 21 L. T. R., 238; L. R., 4 H. L., 171.

ment in his case, that the railway could not be used for the purpose for which it was intended without vibration. It is clear to demonstration that the intention of Parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought, and had sustained the Court of Chancery would interfere by injunction, and would prevent the railway being worked—which, of course, is a reducio ad absurdum, and would defeat the intention of the Legislaure. I have therefore no hesitation in arriving at the conclusion that no action would be maintainable against the railway company."

This permission, of course, does not authorize the thing to be done negligently or even unnessarily to cause damage to others. Much was argued by the learned counsel for the respondent as to the particular jurisprudence of Quebec; but in truth there is no such difference between the law of England and the law of Quebec in this respect as he seemed to suppose. The law of England, equally with the law of the province in question, affirms the maxim "*Sic utere tuo ut alienum non laedas,*" but the previous state of the law, whether in Quebec, or France, or England, cannot render inoperative the positive enactment of a statute, and the whole case turns, not upon what was the common law of either country, but what is the true construction of plain words authorizing the doing of the very thing complained of.

The Legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong. The thing to be done is a privilege [illegible] all as a right and duty, and it seems to their Lordships [illegible] nes within the express language of the Code (art. 356).

But it is said that the Dominion Railway Act itself expressly maintained the liability of railway companies under provincial law for damages caused by their operation, and s. 32 is referred to. This may be disposed of in a sentence. That section refers to compensation under the Act, and not to damages in an action at all, which is what the question here.

Sect. 288 is more plausibly argued to have maintained the liability of the company, notwithstanding the statutory permission to use the railway; but if one looks at the heading under which that section is placed, and the great variety of provisions which give ample materials for the operation of that section, it would be staining the words unduly to give it a construction which would make it repugnant, and authorize in one part of the statute what it made an actionable wrong in another. It would reduce the legislation to an absurdity, and their Lordships are of opinion, that it can not be so construed.

MAYOR OF EAST FREMANTLE v. AUMAIS[1]

24. Where a public body, acting in the execution of their public duties for the public benefit, do an act which they are authorized by law to do, and the act, though done in a proper manner, causes special injury to a particular person, that person has no remedy unless one is given by statute.

25. The appellant corporation, acting in pursuance of statutory powers, altered the gradient of a street in the town, and thereby seriously interfered with the access to the respondent's house.

26. The act under which the appellants acted made no provision for compensation in respect of consequential injury.

27. It was held that the respondent could not maintain an action against the corporation in respect of such injury.

LORD MACNAUGHTEN, page 733:—The law has been settled for the last 100 years. If a person in the position of the appellants, acting in the execution of a public trust and the public benefit, do an act which they are authorized by to do, and do in a proper manner, though the act so done ks a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by Lord Kenyon and Buller, J., and their view was approved by Abbot, C.J., and the Court of King's Bench. At the same time Abbot, C.J., observed that if in doing the act authorized the trustees acted arbitrarily, carelessly, or oppressively, the law, in his opinion, had provided a remedy. Those words, "arbitrarily, carelessly, or oppressively," were taken from the judgment of *Gibbs, C.J., in Sutton* v. *Clarke*,[2] decided in 1815. As applied to the circumstances of a particular case they probably create no difficulty. When they are used generally and at large it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language, Turner, L.J., observed in a somewhat simpler case *Galloway* v. *Corporation of London*[3] that "such powers are at all times to be exercised *bonâ fide* and with judgment and discretion." And a recent case *Soutwark and Vauxhall Water Company* v. *Wandsworth District Board*,[4] where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act, the present Master of the Rolls, then Collins, L.J., observed that "the only question is, has the power

1 Western Australia, rev., 18th December, 1901, 85 L. T. R., 732.
2 6 Taunt., 29.
3 10 L. T. Rep., 439; 2 De G. J. & S., 213
4 79 L. T. Rep., 132; (1898) 2 Ch., 630

been exceeded? Abuse in only one form of excess. Their Lordships are of opinion that the principles laid down by Lord Kenyon and Abbot, C.J., have not been in the slightest degree modified by the more recent cases referred to by Hensman, J. They were all cases where, upon the true construction of the particular statute under consideration, the court held that there was no intention of authorizing interference with private rights. In *Geddis* v. *Proprietors of Bann Reservoir*[1] the defendants had flooded the lands of the plaintiffs, and had done so, as the court held, without any statutory authority. In *Metropolitan Asylum District* v. *Hill*[2] the remarks of Lord Watson must be taken in connection with the circumstances of the case with which his Lordship was then dealing. As his Lordship observes, "what was the intention of the Legislature in any particular Act is a question in the construction of the Act." There it was held, as Lord Selborne, L.C., pointed out, that there was no statutory right to commit and that no use of any land which must necessarily be a nuisance and common law authorized. As Lord Blackburn observed in a later case *Truman* v. *London, Brighton, and South Coast Railway*,[3] quoting Bowen, L.J., there was not to be found in the Act under consideration in *Metropolitan Asylum District* v. *Hill*" any element of compulsion or any indication of an intention to interfere with private rights." *In Vermon* v. *Vestry of St. James*,[4] in the very sentence quoted by Hensman, J., James, L.J., went on to say that he was of opinion that there was no legislation in the case authorizing the vestry to interfere with private rights. In an earlier part of his judgment the Lord Justice had observed: "there are no words here that authorize the vestry to commit a nuisance." The learned counsel for the appellants was unable to refer their Lordships to a report of the *Victorian case of King* v. *Mayor of Kew* (not reported).

RIGHTS OF WIDOW AND CHILDREN.

ROBINSON v. CANADIAN PACIFIC RAILWAY CO.[5]

28. In the interpretation of the Civil Code, the earlier law and decisions for the purpose of interpreting the provisions of a statutory Code can only be justified on some special grund, such as the doubtful import of previously acquired technical meaning of the language used therein.

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1 3 App. Cas., 430.
2 44 L. T. R., 653.
3 54 L. T. Rep., 250; 11 App. Cas., 45
4 44 L. T. R., 229.
5 Supr. C., Canada, rev., 23rd July, 1892, 67 L. T. R., 505; L. R. 1892, App. Cas., 481; 61 L. J. R., n.s., 79; 8 T. L. Rep., 722

29. By article 2262 (2) of the Civil Code, actions for bodily injuries must be brought within a year, "saving the special provisions contained in art. 1056 and cases regulated by special laws."

30. By article 1056, "Where a person injured by the commission of an offence or a quasi offence, dies in consequence without having obtained indemnity or satisfaction, his consort has as right within a year after his death to recover damages from the person who committed the offence." The husband of the appellant was injured by the negligence of the servants of the respondents and died fifteen months afterwards in consequence of such injuries without having obtained indemnity or satisfaction. His widow commenced an action for damages within a year of his death.

31. It was held that it was not a condition precedent to the widow's rights of action that the deceased should have a good cause of action at the time of his death, but that his claim in respect of his injuries and her claim in respect of his death, were to run separate courses of prescriptions, and that her claim was not affected by the provisions of art. 2262 (2).

VERDICT FOR DAMAGES INAPPRECIABLE.

KERRY v. ENGLAND[1]

32. Where a jury found (1) that the death of the plaintiff's wife had been accelerated, but not to any appreciable extent, by taking a dose of tartar emetic negligently supplied by the defendants; (2) that the plaintiff had suffered no damage to the extent of $1,000:—

33. The action must be dismissed, because the damages attributable to the defendants were on those findings, (which could not properly be disturbed) inappreciable and irrevocable. The Court of Queen's Bench was in error in directing a new trial on the assumption that the findings as to damages are contradictory and illogical.

See CONTRACT: *Construction*; CORPORATION (*Municipal*): *Damages caused by bad state of roads, Damages for drainage works, Negligence.*

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1 Quebec, rev., 26th July, 1898, L. R., 1898, App. Cas., 742.

DEMURRAGE.

See AFFREIGHTMENT: *Bod. to*

DEPOSIT.

See BANK AND BANKING: *Transfer of deposit.*

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EMPLOYER AND WORKMAN.

COMMON EMPLOYMENT.

CAMERON ET AL. v. NYSTRON.[1]

1. Where a defendant has committed negligence by one of his servants, resulting in injury to the plaintiff, the defence of common employment is available to him only where he can show that the plaintiff was also his servant at the time of the occurrence of the injury.

2. Where a stevedore had contracted to discharge a vessel for a lump sum, the fact that the master of the vessel had control over the incidents of the discharge, held not to make the servants of the stevedore the servant of the shipowner so as to free the stevedore from liabilit for their negligence.

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1 New Zealand, aff., 25th April, 1893, 68 L. T. R., 772; 62 L. J. R., n.s., 85.

UNION STEAMSHIP COMPANY v. CLARKE.[1]

3. Where a contract, under which a ship was discharged of its cargo, did not provide that the whole work was to be done by the stevedore, but reserved to the shipowners the employment and control of those members of their crew who worked the tackle of the ship used in such discharge.

4. The shipowners were liable to a servant of the stevedores for injuries occasioned to him by the negligence of a winchman, one of the crew. The winchman was not in the employ of the stevedores, nor subject to their orders and control.

EVIDENCE.

AGAINST WRITINGS.

BANK OF AUSTRALASIA v. PALMER.[2]

1. The principle that parol testimony cannot be received to contradict or modify the terms of a written contract does not apply to a document which forms no part of the contract, and cannot be used to exclude parol evidence of the circumstances attending the signature of one of the parties to such document.

2. Parol evidence cannot be said to be improperly admitted as contradicting or varying a written agreement, when it relates to the circumstances under which the plaintiff's name was appended to a document which was no part of the agreement, but which was placed before him for signature by the defendant after the agreement was concluded.

DON MANUEL.

EDDY v. EDDY.[3]

3. The appellant, after his wife's death, sued his daughter, the respondent, to recover as creditor or herself and his wife's estate, moneys, which he alleged that he had advanced to purchase properties in Quebec, to which she was entitled either in her own right, or under his wife's will: It was held on the evidence, that he had failed to establish his claim.

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1 New Zealand, aff., 3rd February, 1894, L. R., 1894, App. Cas., 185; 70 L. T. R., 177; 63 L. J. R., n.s., 56.

2 New South Wales, aff., 31st July, 1897; 66 L. J. R., n.s., 105; L. R., 1897, App. Cas., 540.

3 Quebec, 24th March, 1900, L. R., 1900, App. Cas., 299; 62 L. J. R., n.s., 58.

4. By the law of Quebec no gift beyond "dons modiques" is permitted from a husband to a wife. The Court of Queen's Bench held that articles of the values of between $5,000 and $6,000 given during a married life of forty years, were such modest ones as the law would not interfere with, and their Lordships declined to dissent from those who dwelt in the society which the law affected.

LORD HOBHOUSE, page 61:—As regards the question, which of the two national laws is applicable to the case, it is necessary to distinguish between different parts of the case, and to see precisely what is meant by saying that it is, or is not, governed by the law of Vermont. There is no dispute that when the Eddys married, the ordinary rules relating to husband and wife in Vermont attached to them, whereby they were separate in property. Now it is contended that when they acquired a domicile in Quebec that incident of their marriage contract was altered. The appellant's suit is not found on the principle that there was community of goods between himself and his wife. That, indeed, would be fatal to his case, which rests throughout on the view that he and his wife were separate, and that she borrowed money of him in order to purchase property for herself. So far it is clear that the law of Vermont applies. The question is whether it applies to gifts between husband and wife domiciled in Quebec. The Quebec law interposes no difficulty as regards separation or community of goods. On these points it leaves parties contemplating marriage free to make what contracts they think fit, and as they may make contracts in Quebec they may equally bring into Quebec ready-made contracts and leave them untouched. As regards gifts between husband and wife the parties are not left to freedom of contract. They are positively prohibited from making such gifts. And considering the nature of the prohibition and the very stringent terms of section 6 of the Civil Code, the view of the Superior Court presents grave difficulties.

LIBEL.

JENOURE v. DELMEGE.[1]

5. Wherever a communication is privileged, it is not necessary for the defendant in an action for libel to prove *bona fides*; the onus is, on the other side, to show malice.

6. There is no distinction in this respect between different classes of privileged communications.

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1 Jamaica, rev., 19th December, 1890, 39 W. Rep., 388; L. R., 1891, App. Cas., 73; 60 L. J. R., n.s., 11.

7. Where a jury was told that the existence of privilege depended on their finding that the defendant honestly believed his statement to be true, this was a misdirection.

LORD MACNAGHTEN, page 380:—See under LIBEL: *Privileged communications.*

NOTARIAL DEED.

TRUST AND LOAN COMPANY OF CANADA V. GAUTHIER.[1]

8. In an action to annul a deed of hypothecary obligation, signed by a married woman to pay the debt of her husband, under article 1301 of the Civil Code, verbal evidence is admitted to prove the fact that the obligation was not given on behalf of the wife, but was for the benefit of the husband.

LORD LINDLEY, page 102:—M. Holdane contended that so long as the notarial act was not set aside upon an improbation, evidence to contradict it was not inadmissible; and he referred to arts. 1208, 1210 and 1211 of the Code in support of this contention. But the notarial act merely says that the money was lent, paid, and advanced to the wife, which was perfectly true. The effect of a notarial act has been much discussed in Lower Canada: see *Cossette* v. *Vinet*[2]; and although it seems settled that a notarial act is conclusive proof that the facts stated in it were stated to the notary and were accepted by him to be true, it does not appear settled that the truth of those facts cannot be controverted except in an improbation proceeding. However this may be, and assuming that the notarial act in this case should be accepted as complete proof of what is stated in it, their Lordships do not think it follows that it should be accepted as complete proof of anything else; and they decline to accept it as complete proof of what might be naturally inferred from it if no further evidence were forthcoming.

SECONDARY EVIDENCE.

FORGET ET AL V. BAXTER.[3]

9. Article 1233, paragraph 6 of the Civil Code of Quebec authorizes reception of secondary evidence of bought and sold notes in possession of the adverse party without a notice to produce; and an objection thereto not taken at the trial cannot be taken in appeal.

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1 Quebec, aff., 3rd November, 1903, L. R., 1904, App. Cas., 94.
2 R. J. Q., 7, R. B., 512.
3 Quebec, rev., 2nd May, 1900, L. R., 1900, App. Cas., 567.

SIR HENRY STRONG, page 477:—It was contended on behalf of the respondent that secondary evidence of the bought and sold notes, and of the final account delivered to the respondent, was not admissible, inasmuch as no notice to produce was given. This objection does not seem to have been made at the trial, when, if it was sustainable, the omission might have been remedied, and their Lordships are of opinion that it cannot be maintained, not only for that reason, but also for the reason that art. 1233, paragraph 6, authorizes the reception of oral proof in cases where the written proof is "in the possession of adverse party" without adding any requirement of a notice to produce or a subpœna *duces tecum* in such a case. It was asserted by counsel for the appellants in answer to the objection that it was not the practice in the Quebec Courts to give such notices, and, as no text of either the Civil Code or the Code of Procedure establishing such a procedure could be referred to, nor any authority produced upon the point, their Lordships are of opinion that they cannot give effect to such an objection derived from the practice of the English Courts not shown to be applicable in the Province of Quebec.

STOCK TRANSACTIONS.

FORGET ET AL. v. BAXTER.[1]

10. In an action by stockbrokers against their principal to recover the balance of their account in respect of sales and purchases of shares for private speculation on his account:—

11. It was held, (1) that these transactions were "commercial matters" within art. 1233, Civil Code, which the plaintiff might prove by oral evidence; and that a plaintiff was a competent witness under sec. 2 of 54 Vict., c. 45.

12. An admission by the defendant in his deposition that he employed the plaintiffs as his stockbrokers, and that they bought and sold something for him, is a sufficient commencement of proof in writing under art. 1233 (7) to let in oral evidence of the particulars.

13. The defendant in giving authority to the plaintiffs to do business on the Stock Exchange must be taken, in the absence of evidence to the contrary, to have employed them on the terms of the Stock Exchange, and, therefore, to have authorized the sale of his shares on failure to supply them with the requisite funds.

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1 Quebec, rev., 2nd May, 1900, L. R., 1900, App. Cas., 467; 82 L. T. R., 510; 69 L. J. R., n.s., 101.

SIR HENRY STRONG, page 475:—But there is a broader ground for admitting proof by testimony in this case, namely, that the transactions in questions are commercial matters within the provision contained in paragraph 1 of art. 1233. Neither in this nor in any other article of the Code is there to be found any definition of the meaning of the term "commercial matters." It cannot be doubted that the business carried on by the appellants as stockbrokers was of a commercial nature, nor that the purchases and sales of shares by the appellants for the behoof of the respondent in the ordinary course of that business were operations of commerce. It does not appear to their Lordships that the fact that the respondent was not himself a dealer trading in shares, but that his object in buying and selling through the agency of the appellants was that of private speculation only, in any way detracts from the commercial character of these transactions as regards the appellants. Unless such a construction is adopted, very great inconvenience, if not actual obstruction, must result in the despatch of business according to the methods in general use, for it must be often impossible to obtain the strict literal proof required in ordinary civil matters. Their Lordships are, therefore, of opinion that the execution by the appellants of the respondent's commissions constituted "commercial matters" within art. 1233, which it was open to them to prove by oral evidence.

See CONTRACT: *Oral evidence*; CRIMINAL LAW; INSOLVENCY: *Eod. vo.*; INSURANCE: (*Fire*) *Eod. vo.*; RESPONSIBILITY: *Eod. vo.*

EXPROPRIATION.

INDEMNITY.

SAUNBY v. THE WATER COMMISSIONERS OF THE CITY OF LONDON.[1]

1. Where commissioners desired to appropriate a person's water rights, or to acquire an easement over his property, as well as where they desire to appropriate his land, they must first take some steps, such as serving him with a notice to treat, to have the compensation determined by arbitration, and that in default of their taking such steps, the appellant could sue them at law for the act complained of, and was entitled to an injunction to restrain them from continuing the wrongful act.

LORD MACNAGHTEN, page 39:—Their Lordships agreed with the opinion expressed by the majority of the judges of the Supreme

1 Supr. C. of Canada, rev., 9th November, 1905, 22 T. L. Rep., 37; 75 L. J., P. C., n.s., 25.

Court, that, assuming that to be so, the water was nevertheless required for the purpose of the waterworks within the meaning of the Act, and the commissioners would be acting within their powers in appropriating the appellant's land and water rights provided they had taken the necessary steps for that purpose. The question was whether they had done so. Their Lordships were of opinion that before the commissioners could expropriate a landowner, they must first set out and ascertain what parts of his land they require, and must endeavour to contract with the owner for the purchase thereof. In other words, they must give to the landowner notice to treat for some definite subject matter. And a similar procedure seemed to be necessary where the commissioners desire to appropriate a person's water rights or to acquire some easement over his property. The arbitration clauses only came into operation or disagreement as to the amount of purchase money, value or damages, which, in itself implied some previous treaty or tender involving notice of what was required. Their Lordships thereof were of opinion that the commissioners had not put themselves into a position to compel the appellant to go to arbitration. Provisions for that purpose, such as were found in the present Act, were only applicable to acts done under the sanction of the Legislature and in the mode prescribed by the Legislature. In this instance the commissioners had not proceeded in accordance with the directions of their Act, and, consequently, the appellant had not lost his ordinary right of action for the trespass on his property. In coming to that conclusion their Lordships followed the principles laid down by this Board in *Corporation of Parkdale* v. *West*,[1] and *North Shore Railway Co.* v. *Pion*,[2] thought the provisions of the Acts in question in those cases were somewhat different. It was contended by Mr. Aylesworth that, at any rate, the Court in the exercise of its discretion should have given the appellant a judgment for damages only and not for an injunction. The acts complained of in the present case were an illegal taking of the appellant's land, and an interference with the free use by him of his property, and the damages had been found to be of a substantial character. It had been frequently pointed out that to refuse an injunction in such a case would be to enable the defendant to expropriate the plaintiff without statutory authority (if any). See *Imperial Gas, Light and Coke Company* v. *Broadbent*,[3] and *Shelfer* v. *City of London Electric Lighting Company*.[4] If and when the respondents thought fit to proceed under the Act to expropriate the appellant the injunction would come to an end, but it was not necessary to qualify it by any words for that purpose.

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1 12 App. Cas., 602
2 14 App. Cas., 612.
3 7 H. L. C. 1900
4 1 Ch., 287, 1895.

PERRY v. CLISSOLD.[1]

2. A person in possession of land in the character of owner, and having, therefore, a good title against all the world but the rightful owner, has a *prima facie* claim to compensation for the compulsory taking of such land under statutory powers.

LORD MACNAGHTEN, page 21:—It cannot be disputed that a person in possession of land in the assumed character of owner, and exercising peaceably the ordinary rights of ownership, has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title. On behalf of the Minister reliance was placed on the case of *Doe d. Carter* v. *Barnard*,[2] which seems to lay down this proposition — that a person having only a possessory title to land be supplanted in the possession by another who has himself no better title, and afterwards brings an action to recover the land, he must fail in case he shows in the course of the proceedings that the title on which he seeks to recover was merely possessory. It is, however, difficult, if not impossible, to reconcile this case with the later case of *Asher* v. *Whitelock*,[3] in which *Doe d. Carter* v. *Barnard*[2] was cited. The judgment of Chief Justice Cockburn is clear on the point. The rest of the court concurred, and it may be observed that one of the members of the court in *Asher* v. *Whitelock*[3] (Mr. Justice Lush) had been counsel for the successful party in *Doe d. Carter* v. *Barnard*.[2] The conclusion at which the court arrived in *Doe d. Carter* v. *Barnard*[2] is hardly consistent with the views of such eminent authorities on real property law as Mr. Preston and Mr. Joshua Williams. It is opposed to the opinions of modern text-writers of such weight and authority as Professor Maitland and Mr. Justice Holmes, of the Supreme Court of the United States.

Their Lordships are of opinion that it is impossible to say that no *prima facie* case for compensation has been disclosed.

They do not think that a case for compensation is necessarily excluded by the circumstances that, under the provisions of the Act of 1900, the Minister acquired not merely the title of the person in possession as owner, but also the title, whatever it may have been, of the rightful owner out of possession who never came forward to claim the land or the compensation payable in

1 New South Wales, aff., 1906, 76 L. J. R., n.s., 19.

2 13 Q. B., 945

3 L. R., 1 Q. B., 1.

respect of it, and who is, as the Chief Justice says, "unknown to this day."

The Act throughout, from the very preamble, has it apparently in contemplation that compensation would be payable to every person deprived of the land resumed for public purposes. It could hardly have been intended or contemplated that the Act should have the effect of shaking titles which but for the Act would have been secure, and would in process of time have become absolute and indisputable, or that the Governor, or responsible Ministers acting under his instructions, should take advantage of the infirmity of anybody's title in order to acquire his land for nothing. Even where the true owner after diligent enquiry cannot be found, the Act contemplates payment of the compensation into Court to be dealt with by a Court of equity.

It only remains for their Lordships to express their opinion that the valuation to be made should be a valuation of the land as at the date of the notification of resumption.

When the valuation is made it will be for the claimants to take such proceedings as they may be advised to recover the amount, unless the Minister thinks fit to pay them or to pay the money into Court.

See PROPERTY, *Eod. vo.*: STATUTES: *Eod. vo.*

EXTRADITION.

JURISDICTION.

UNITED STATES OF AMERICA v. GAYNOR ET AL.[1]

1. The respondents having been arrested in Montreal by order of the Extradition Commissioner for an alleged extradition offence in the State of Georgia, were remanded by him for the purpose of affording the prosecution an opportunity of proving its case. Thereafter, one judge in Quebec issued on their application and then quashed writs of *habeas corpus*, while another judge afterwards issued similar writs and discharged the respondents from custody on the ground that no extradition offence had been disclosed against them in the proceedings before him:—

2. The Judical Committee held that this was the question which the Extradition Commissioner had jurisdiction to investigate on the remand which he had ordered, that his remand warrant could not be treated as a nullity, that the respondents were in lawful custody, and that, in consequence, the judge had no jurisdiction to order their release.

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1 Quebec, rev., 8th February, 1905, L. R., 1905, App. Cas., 128; 92 L. T. R., 276; 74 L. J. R., n.s., 44; 21 T. L. Rep., 254.

EARL OF HALSBURY, L.C., page 134:—Now, the only question which the learned judge had to determine was whether the accused were at the time of the issue of the writ in question in lawful custody. If they were, he had no jurisdiction to release them, but was bound to remand them to custody; and up to this point it is difficult to see what ground could be even suggested for their release.

The offence of theft was an offence which made the offender liable to extradition.

The commissioner was invested by the Extradition Act, with all the powers of a judge in that behalf, and under the commissioner's warrant the officer having the custody of the accused was to receive and keep them till a particular date (May 27th, 1902), and then bring them before the commissioner to be further dealt with according to law.

It is difficult to understand what is the supposed unlawfulness of the custody, and it is only upon the supposed unlawfulness of the custody that any application for discharge could be founded.

It was probably owing to some mistake as to the jurisdiction of the commissioner that any writ was issued. At all events, when the facts were placed before Andrews, J., and the prisoners were brought before him under his order, the learned judge did what was obviously right. He remanded them to their lawful custody, from which they never ought to have been removed.

Page 136:—Their Lordships are of opinion that Andrews, J., was quite accurate in what he then did. There had been a regular and proper application to the Extradition Commissioner, who had appointed a day for the regular procedure in extradition, and had in the meantime committed the accused to the proper custody by way of remand.

Andrews, J., was apparently not informed of this, and he issued the writ of *habeas corpus*, but (as will be pointed out hereafter) the writ, if issued, could have no other return than that the cause of detention was a lawful remand by a commissioner having jurisdiction over the subject-matter of the inquiry.

When the learned judge found out the mistake that had been made, he at once proceeded to put it right, and then the somewhat extraordinary intervention of Caron, J., took place, which has given rise to this appeal. Notwithstanding the judgment of Andrews, J., before him, who had justly pointed out that the matter stood for adjudication before him, the learned judge issued a writ of *habeas corpus* returnable before himself, and ultimately discharged the accused from custody upon grounds which their Lordships have some difficulty in following.

Caron, J., first gets rid of the adjudication by Andrews, J., by misapprehension of that learned judge's language. Andrews, J., undoubtedly did decide the question before him, which was whether Mr. Commissioner Lafontaine's order showed a sufficient cause of detention, and he decided that it did.

Andrews, J., gave his reasons, and thus Caron, J., confuses with the adjudication. The adjudication was (*a*) the determination that the imprisonment was lawful, and (*b*) the indorsement on the writs that they were quashed. That is, in point of law, the judgment, and though it is common enough to speak of a learned judge's judgment in referring to the reasons by which that judgment is supported, it is somewhat singular to find a learned judge himself confusing the two things.

The substance of Caron, J.'s, determination appears to have been that no offence within the meaning of the Extradition Act was shown upon the document that had been brought before him by a writ of *certiorari*. Their Lordships are wholly unable to agree with him. There was an accusation of theft, which is an offence in both countries; but the learned judge does not appear to have apprehended that an accusation, on information, of theft was enough for the claim to arrest and detain. Whether the accusation was well founded, or whether there was enough to justify the Extradition Commissioner in committing for surrender was a question which would have been regularly brought before him and determined at the proper time if the due course of justice had not been interfered with by the interposition of the learned judge. The learned judge accurately points out that a conspiracy is not an offence within the treaty, and because an indictment for conspiracy has been framed in which acts of larceny are charged as overt acts of the conspiracy, the learned judge seems to think that the United States Government are estopped from treating them as distinct and independent acts of larceny. The whole matter, and *inter alia* how much evidence there was of larceny, would have been duly and properly investigated if the case had been allowed to take its proper course. Their Lordships do not mean to suggest that the writ of *habeas corpus* is not applicable when there is a preliminary proceeding. Each case must depend upon its own merits. But where a prisoner is brought before a competent tribunal, and charged with an extradition offence and remanded for the express purpose of affording the prosecution the opportunity of bringing forward the evidence by which that accusation is to be supported; if, in such a case, upon a writ of *habeas corpus*, a learned judge treats the remand warrant as a nullity, and proceeds to adjudicate upon the case as though the whole evidence were before him, it would paralyze the administration of the justice and render it impossible for the proceedings in extradition to be effective.

The proceedings are very simple: information and arrest; then, either at once or on remand, the judge investigates the case, and either discharges or makes up his mind to commit for extradition; and, if he does the latter, he has to inform the accused person that he will not be surrendered for fifteen days, in order to afford him an opportunity of bringing the legality of his surrender before a court of justice.

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FISHING RIGHTS.

GRANT OF

CABOT v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC.[1]

1. The grant to appellant was held not to give the exclusive right to fish for salmon opposite the lands, the subject of the grant.

FORGERY.

See BANKS AND BANKING: *Forged Cheque.*

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1 Quebec, aff., 31st July, 1907, 23 T. L. R., 762.

FRAUD.

CONFESSION OF JUDGMENT.

EDISON GENERAL ELECTRICITY CO. v. WESTMINSTER AND VANCOUVER TRAMWAY CO.[1]

1. Where a statute enacts that in case any person in insolvent circumstances voluntarily or by collusion with a creditor gives a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment, with intent to defraud or delay his creditors or to give undue preference to a particular creditor, pressure by such creditor is no answer to a case which alleges collusion. Collusion in such an enactment means agreement or acting in concert.

SIR RICHARD COUCH, page 38:—If the appellants' case had only been that there was a fraudulent preference of the bank, the pressure by the bank might have been an answer to it; but their Lordships do not see how pressure alone can be an answer to a case which alleges collusion. The statute is in the alternative. The confession of judgment may be given either voluntarily or by collusion with a creditor. In either case, if there is the intent to defeat or delay creditors, or to give a preference over other creditors, the confession is made null and void against creditors. In *Gill* v. *Continental Gas Co.*, 1872,[2] Lord Bramwell said, that the word "collusion" only signified agreement. In their Lordships' opinion, "collusion" in this section means agreement, or acting in concert.

FRADULENT MISREPRESENTATIONS.

BARRETTE v. LE SYNDICAT LYONNAIS DU KLONDYKE.[3]

2. The judgment of the Supreme Court of Canada[4] was reversed upon the ground that the charges of fraudulent misrepresentations on the sale of certain mining claims had not been established.

IN CONTRACT.

ASSETH COMPANY v. MERE ROHIH ET AL.[5]

3. The fraud which must be proved in order to invalidate the title of a registered purchaser for value, must be brought home to the person whose title is impeached, or to his agents. He cannot be affected by the fraud of persons through whom

1 British Columbia, rev., 21st November, 1896, 66 L. J. R., n.s., 36; 13 T. L. Rep., 62.
2 41 L. J. Ex., 176; L. R., 7 Ex., 332.
3 Supr. C., Canada, 9th May, 1907, rev., 23 L. T. Rep., 532
4 36 Supr. C. Rep., 279.
5 New Zealand, rev., 1st March, 1905, 92 L. T. R., 397

he claims unless knowledge of it is brought home to him or his agents.

MOTIVE OF

KING V. HENDERSON.[1]

4. A plaintiff or petitioner who institutes and insists in a process before the bankruptcy or any other court, in circumstances which make it an abuse of the remedy sought, or a fraud upon the court, cannot be said to have acted in that proceeding either with reasonable or probable cause.

5. But to constitute an abuse of process or a fraud upon the court, mere motive, however reprehensible, will not be sufficient; it must be shown that the remedy should be unsuitable and would enable the person obtaining it fraudulently to defeat the rights of others.

LORD WATSON, page 160:—The very intelligible principle which was recognized in *Ex parte Wilbran*[2] does not appear to their Lordships to have been departed from in any of the subsequent decisions which were brought under their notice by the industry of the appellant's counsel. Motive cannot in itself constitute fraud, although it may incite the person who entertained it to adopt proceeding which, if successful, would necessarily lead to a fraudulent result; and it is not the motive, but the course of procedure which leads to that result which the law regards as constituting fraud. *In re Davies*,[3] the Court of Appeal refused to make an adjudication in bankruptcy where it was clearly shown that the proceeding had been used and was meant to be used for the illegitimate and fraudulent purpose of extorting money from the debtor. And again in *Ex parte Griffin*,[4] the same court, although there was a good petitioning creditor's debt, and an act of bankruptcy had been committed, refused to make an adjudication. The ratio of the decision was thus explained by James, L.J.: "I think I never knew a case so transparent as to fraud with which the whole thing was conceived, and the oppression which it was intended to exercise. It would, I think, be a shocking thing for any court of justice in a civilized country to be made the instrument of proceeding like those."

See INTEREST: *In case of fraud.*

FREIGHT.

See AFFREIGHTMENT: *Lien for freight.*

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1 New South Wales, aff., 23rd June, 1898, 47 W. Rep., 157; L. R., 1898, App. Cas., 720.
2 5 Madd. 1.
3 25 W. R., 239, 3 Ch. 461.
4 28 W. R., 208, 12 Ch. D., 480.

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GAMING AND WAGERING.

STOCK TRANSACTIONS.

FORGET v. OSTIGNY.[1]

1. Article 1927 of the Canadian Civil Code does not differ substantially from 8 and 9 Vict., ch. 109, sec. 18, and renders null and void all contracts by way of gaming and wagering; and a contract entered into merely for purposes of speculation is not a gaming contract within this article.

2. A broker was employed to make actual contracts of purchase and sale, in each case completed by delivery and payment, on behalf of a principal whose object was not investment but speculation:—

3. These were not gaming contracts within the meaning of the Code. Costs of both parties directed to be paid by the

1. Quebec, rev., 30th March, 1895, L. R., 1895, App. Cas., 318; 72 L. T R., 399; 64 L. J. R., n.s., 62; 43 W. Rep., 590.

successful appellant, special leave having been given to him under special circumstances notwithstanding the small amount at stake.

LORD CHANCELLOR, page 323:—It may well be that the appellant was aware that in directing a purchase to be made, the respondent did not intend to keep the shares purchased, but to sell them when, as he anticipated would be the case, they rose in value, that his object was not investment but speculation. To enter into such transactions, with such an object, is sometimes spoken of as "gambling on the Stock Exchange," but it certainly does not follow that the transactions involve any gaming contract. A contract cannot properly be so described merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value, and with the intention of realizing a profit by its resale. Such dealings are of everyday occurrence in commerce. The legal aspect of the case is the same whatever be the nature of the commodity, whether it be a cargo of wheat or the shares of a joint stock company. Nor, again, do such purchases and sales become gaming contracts because the person purchasing is not possessed of the money required to pay for his purchases, but obtains the requisite funds in a large measure by means of advances on the security of the stocks or goods he has purchased. This, also, is an every day commercial transaction. For example, a merchant who has to pay the price of a cargo purchased before he resells it obtains in ordinary course the means of doing so by pledging the bill of lading. Much stress was laid on the fact that the respondent never asked for delivery of any of the shares purchased, and that the appellant never tendered such delivery. The question whether a contract is intended to be executed by delivery according to the obligations expressed upon the face of it is no doubt an important test for determining whether it is a real one or only a gambling arrangement under the guise of a commercial contract.

In the Act passed by the Dominion Parliament in 1888 (51 Vict., ch. 42), with a view of putting down what were then known as "bucket shops," it is provided (sec. 1), that: "Every one who..... with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking..... or of any goods, wares or merchandise, in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery, and every one who acts, aids or abets in the making or signing of any such contract or agreement is guilty of a misdemeanour."

A proviso was, however, added in the following terms: "but the foregoing provisions shall not apply to cases where the broker

of the purchaser receives delivery, on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase-money or any part thereof."

Their Lordships think this proviso was enacted by way of precaution only, inasmuch as they cannot doubt that where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery to the broker is delivery to the principal just as much as if it had been actually made to himself.

In the present case the respondent might at any time on tendering the balance due in respect of any of the shares purchased have required the appellant to deliver them to him. As has been pointed out, he received the dividends upon them, and any increase in their value enured exclusively for his benefit, whilst if there were a diminution of value the loss was exclusively his.

It is unnecessary to inquire whether, in pledging the securities of his clients for a lump sum to raise the moneys which he was authorized by them to raise instead of obtaining separate loans on their several securities, the appellant was acting within the authority conferred upon him, for it does not seem to their Lordships to have a material bearing upon the question whether the contract sued on was a gaming one.

The decision of the English courts are, of course, not authorities upon the construction of the article of the Canadian Code. But the words of the English statute relating to gambling contracts (8 and 9 Vict., ch. 109) do not differ substantially from those found in the Code. That statute renders null and void all contracts by way of gaming and wagering. The English authorities may therefore, well be referred to as throwing light on the question what constitutes a gaming contract.

The case of *Thacker* v. *Hardy*,[1] in the Court of Appeal in England, was very similar to that under consideration. The plaintiff was a broker, who purchased and sold stocks and shares on the Stock Exchange for the defendant by his authority. He sued the defendant for commission and for any indemnity in respect of certain contracts into which he had entered, pursuant to the defendant's instructions. The defence was founded upon 8 and 9 Vict., ch. 109, sec. 18.

Lindley, J., held, and his judgment was affirmed by the Court of Appeal, that the plaintiff was entitled to recover.

Bramwell, L.J., said: "The bargains made by the plaintiff upon behalf of the defendant were what they purported to be, they gave the jobber a right to call upon the broker or the principal to take the stock, and they gave the broker the right to call upon the jobber to deliver it."[2]

1 42 B. D., 685.
2 42 B. D., 690.

He further said: "I will assume that was the nature of the bargain between the parties, and that by its terms the principal would be entitled to call on the broker to resell the stock, so that, instead of taking and paying for it, the principal would have to pay only the differences. In my opinion that bargain does not infringe the provisions of 8 and 9 Vict., ch. 109, which was directed against gaming and wagering, for the principal might take the stock which has been bought for him, and it is an investment."[1]

He points out, too, that there is no gaming and wagering in a transaction of the kind now in question. The passage is as follows: "The broker has no interest in the stock, and it does not matter to him whether the market rises or falls, but when a transaction comes within the statute against gaming and wagering, the result of it does not affect both parties. In the case before us, the broker does not wager at all."

Cotton, L.J., laid down what in his view was of the essence of a gaming contract in these terms: "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature. . . . . that is to say, if the event turns out one way, A will lose, but if it turns out the other way, he will win. But that is not the state of facts here. The plaintiff was to derive no gain from the transaction, his gain consisted in the commission which he has to receive whatever might be the result of the transaction to the defendant. Therefore, the whole element of gaming and wagering was absent from the contract entered into between the parties." Even where a person is employed to enter into gambling contracts upon commission, it has been held by the courts of this country that, if he makes payments in pursuance of such employment, he can recover such payments from his principal, that the implied contract of indemnity is not, in such a case, in itself a gaming or wagering contract, and is, therefore, not null and void. The intervention of the legislature was considered necessary in order to invalidate such contracts, and by the Gaming Act, 1892, any promise, express or implied, to pay any person any sum of money paid by him in respect of a contract rendered null and void by 8 and 9 Vict., ch. 109, or to pay any sum by way of commission or reward for any services in relation thereto, is rendered null and void.

FORGET ET AL. v. BANTER.[2]

3. The defence of gaming contract, under article 1927 of the Civil Code of Quebec, set up in the court of first instance, was not insisted upon either in the Court of Queen's Bench nor

1 42 B. D., 691

2 Quebec, rev., 2nd May, 1900, L. R., 1900, App. Cas., 467

on the appeal before the Privy Council. See *Remarks of Sir Henry Strong*, pages 471 and 474 of the report.

GAS.

CHARTER OF MONTREAL GAS COMPANY.

MONTREAL GAS COMPANY v. CADIEUX.[1]

1. Under section 20 of the Canadian statute, 12 Vict., ch. 183, a gas company has power to cut off the supply of gas from a house, although no gas rent is in arrear in respect of the supply to another house occupied by the same customer.

GIFTS.

NUMANUEL.

EDDY v. EDDY.[2]

1. Gifts of jewels, moneys and like personal matters referable to married life can be established by verbal evidence. Their Lordships would require strong and clear reasons for dissenting from the judgment rendered by those who dwelt in the society which the law affects.

DURING LAST ILLNESS.

ARCHAMBAULT ET VIR. v. ARCHAMBAULT ET AL.[3]

2. Gifts made by the testator to the respondent during his lifetime would not be avoided under article 762 of the Civil Code where there was neither allegation nor evidence that they were made in expectation of death. The provision in the article, "unless circumstances tend to render them invalid," require that those circumstances should be investigated.

LORD DAVEY, page 582:—There is only one other point to which reference need be made, and that is a point which has been raised by the learned counsel, who argued this case with great zeal and very fully on behalf of his client, on art. 762 of the Civil Code, which, in the English version is in these words: "Gifts purporting to be *inter vivos* are void as presumed to be made in contemplation of death when they are made during the

1 Supr. C., Canada, rev., 28th July, 1899, 81 L. T. R., 274; 68 L. J. R., n.s., 126.

2 Quebec, aff., 24th March, 1900, L. R., 1900, App. Cas., 299.

3 Quebec, aff., 16th July, 1902, L. R. 1902, App. Cas., 575, 71 L. J. R., n.s., 131.

supposed mortal illness of the donor, whether it be followed or not by his death, unless circumstances tend to render them valid." The French version is, "Si aucunes circonstances n'aident à les valider." The learned counsel contends that we ought to apply the rule laid down in that article of the Code to the gifts which were made by the testator, Dr. Archambault, to the respondent during his lifetime. Now, their Lordships think that the first answer to the argument which was put before them on that point is that this is not raised by the pleadings. There is no allegation, for example, that the gifts were made during the supposed mortal illness of the donor, which, of course, means during an illness of the donor which was supposed by those about him, and believed by himself, to be mortal in its character — that is, likely to result within a short period in his death. There is no allegation of that kind in the pleadings. The nearest approach to it which the learned counsel can point to is, their Lordships think, in paragraph 19 of the declaration, which alleges the circumstances before mentioned of the donor contracting a syphilitic contagion, which was followed gradually by syphilitic rheumatism and progressive locomotory ataxia, and that those two maladies went on *en s'aggravant jusqu'à la mort.* That is, very different from an allegation that a particular gift was made in expectation of death — very different, indeed, from the allegation which would be required to base upon it legal argument founded on art. 762 of the Code. This appears to have occurred to the plaintiff's advisers themselves, for their Lordships are informed that an attempt was made to raise this point before the judge of first instance; and, as a means of enabling the learned counsel for the plaintiff to raise it, an application was made to the learned judge to permit an amendment of the pleadings by introducing the necessary averments. That application, apparently, was not successful, and, consequently, the point was not allowed to be raised in the court of first instance. The learned counsel for the appellants points out with perfect truth that the point is raised in his factum before the Appellate Court. That is quite true, but the application which had been made in the court below was not renewed in the Appellate Court, and the Appellate Court had no materials therefore, in the pleadings upon which they could deal with the point. As a matter of fact, their Lordships are informed that the point was not argued in the Court of Appeal—at least, not fully argued; and certainly there is no trace in the very careful judgment of Bossé, J., of the point ever having been brought to their consideration, or even ever having been considered by them. The inconvenience of raising for the first time on a final appeal a point which has not been the subject of consideration in the courts below has been frequently pointed out both here and in the House of Lords. Certainly it is a rule of practice at this Board that a new point will not be entertained by their Lordships

which might have been met by evidence in the court below. It will at once appear from the terms of the article of the Code, which has been read, that this is a point which has been met by evidence, because the whole enactment of the article is made subject to the proviso "unless circumstances tend to render them valid." Now, if this point had been taken in the court below, namely, that these gifts were made at a time when the testator was suffering from a supposed mortal illness, and knew that he was so suffering, that might have been met by evidence to show that that was not the state of facts. It might have been met by evidence to show that, notwithstanding the state of bodily health in which the donor was, the gift was nevertheless made under circumstances which render it a valid gift.

See EVIDENCE: *Don manuel.*

GUARANTEE.

See RIPARIAN PROPRIETOR: *Sale of water power.*

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HUSBAND AND WIFE.

CUSTODY OF CHILDREN.

SMART v. SMART.[1]

1. On the application of a husband against his wife for a writ of *habeas corpus* in respect of their three children; two of them being above twelve years of age, and, therefore, not within the discretion as to custody given by a local statute framed on the principle of Talfourd's Act, it appeared that the wife had twice left him, taking her children with her, on account of his habitual drunkenness; that on each occasion he agreed that she should maintain and educate the children

1 Aff., 30th July, 1892, L.R., 1892, App. Cas., 425; 67 L.T.R., 510; 8 T.L. Rep., 748.

apart from him; that after the second separation he publicly and falsely alleged on oath against his wife charges so injurious that she could not be expected ever to live with him again; that the wife had ample means, while the husband had only a narrow income;

2. It was maintained that the court below exercised the right discretion in discharging the writ and remanding the children to the custody of their mother.

3. The father's legal power was controlled, as to the youngest child, by a statute which gave absolute authority to the court; it was materially affected as regards the other two by breach of marital duty, by consideration, by respect to their welfare, and the objections to separating them from each other.

Lord Hobhouse, page 512:—Their Lordships are disposed to think that the facts of this case are such that, even if it had occurred early in this century, the court would have been induced to give the custody of the children to their mother. But they remarked during the argument, and wish to remark again, that no one has stated in other than elastic terms the grounds on which the court should think fit to interfere. There must be a sufficient amount of peril to the welfare of the children. But that sufficient amount can hardly be fixed for one age by the standard of another. Drunkenness, for instance, is looked upon as a much graver social offence now than was the case two or three generations ago, and its effect upon the welfare of a family must be judged of accordingly. For many years the tendency of legislative action and of judicial decision, as well as of general opinion, has been to give to married women a higher status, both as regards property and person; and in family questions, to bring the material duty of the husband and the welfare of the children into greater performance; in both respects diminishing the powers accorded to the husband and the father. This change must necessarily affect the view of judges upon the welfare of families when they are called on to exercise their discretion; or, what is not a very different think to decide, what is sufficient cause for taking children out of the custody of the father.

Page 532:—His Lordship commented upon the cases of *re Fynn*,[1] *Ward* v. *Ward*,[2] *Wellesly* v. *Duke of Branfort*,[3] *re Halliday*,[4] *re Taylor*,[5] *re Elderton*.[6]

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1 2 Gd Sm., 457.
2 2 Ph., 786.
3 Paris, 1
4 17 Jur., 56.
5 4 Ch. D., 157.
6 25 Ch. D., 220.

HUSBAND'S DEBT.

TURNBULL v. DUVAL.[1]

4. A deed executed by a married woman as security for her husband's debts, obtained by pressure and without independent advise by the husband and the wife's trustee, who was the creditor's agent, and also by concealment of material facts, was set aside.

TRUST AND LOAN COMPANY OF CANADA v. GAUTHIER.[2]

5. By the true construction of article 1301 of the Civil Code of Lower Canada, a wife's mortgage of her separate property is void, both as to debt contracted and as to the disposition, if it is in any way for her husband's purposes.

6. Ignorance on the part of the lender that the money was borrowed for her husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed.

LORD LINDLEY, page 99:—The law applicable to the case is contained in art. 1301 of the Civil Code of Lower Canada, which in English runs thus: "A wife cannot bind herself either with or for her husband otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect."

The expression "in any other quality," is explained by turning to the French text of the Code, where the words "otherwise than as being common as to property" appears as "en qualité de commune." There is no question here as to common property. The property dealt with was the wife's separate property, and this she can dispose of with the concurrence of her husband: see art. 177 of the Code. But after marriage neither husband nor wife can dispose of their respective properties for the benefit of the other except in a few specified cases which may be disregarded on the present occasion: see art. 1265.

The language of art. 1301 renders it necessary to distinguish between obligations contracted by her. The object of the article is evidently to protect her against her husband and against herself. Except in dealing with their common property she is not to bind herself with him, *i.e.*, she is not to join him in any obligation which affects him. But she clearly does not infringe art. 1301 by simply disposing of her own property with his concurrence under art. 177. If this is done for her own benefit, the disposition is

1 Jamaica, aff., 18th April, 1902, 71 L. J. R., n.s., 85.

2 Quebec, aff., 3rd November, 1903, L. R., 1904 App. Cas., 94; 89 L. T. R., 453; 73 L. J. R., n.s., 15.

good. If, however, she disposes of it for her husband, she immediately falls within art. 1301.[1] What then is meant by "for him"? Does it mean jointly with him, or as his surety and nothing more? or does it mean for him generally, *i.e.*, in any way for his benefit? Again, is the knowledge, or, rather want of knowledge, of her obligee (créancier) important? If a person deals with her *bonâ fide* and without knowing that she is binding herself for her husband, is her obligation nevertheless null and void, if it turns out to have been for her husband in fact? Must a person lending money to a married woman on her separate property run the risk of losing his money, unless he takes care to ascertain that it is not borrowed for her husband? The answers to be given to these and other questions all depend on the true meaning and legal effect of art. 1301, and on the meaning to be attributed to the expression for "her husband."

Their Lordships are not surprised to find that art. 1301 has given rise to much difference of judicial opinion. It is not necessary to comment on the numerous decisions on this article. They cannot all be reconciled with each other, but their Lordships gather from the decisions referred to in the argument and in the published commentaries[2] on the Civil Code, that the words, "for her husband," are now judicially held to mean generally in any case was for his purposes as distinguished from those of his wife; and that ignorance on the part of the obligee (*créancier*) cannot avail him if it is proven that she, in fact, bound herself for her husband. These conclusions are, in their Lordships' opinion, sound and in accordance with the language of art. 1301, and with its evident object.

It is seldom necessary to consider on whom the burden of proof lies when the evidence is complete, but it appears to their Lordships that art. 1301 would have little or no effect in practice if the burden was on the wife to prove that she was acting for her husband. The modern decisions in Canada show (and their Lordships think correctly) that the lender must prove that she was acting, not for her husband's benefit, but for herself.[3] If this is proved, the subsequent application by her of money, she gives it to her husband, or applies it for her benefit, it is difficult to come to the conclusion that she in truth borrowed it for herself.

Art. 1301 clearly goes further than the law which prevailed in Lower Canada before the Code was framed; but their Lordships cannot accede to the argument that the language used and deliberately adopted in the Code must be narrowed and held to have no greater effect than the previous law for which it has been substituted.

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1 6 Mignault, 186, 190; 1 Sharp, 578.
2 6 Mignault, 189, 191.
3 6 Mignault, 191.

The law then being, as above stated, and the facts being as already set forth, their Lordships are unable to differ from the decision appealed from. Taking the whole of the evidence, their Lordships cannot avoid coming to the conclusion that the security in question was, in fact, given by Madame Corriveau for her husband, although the plaintiffs did not know it. Such being the case, the security is void.

Mr. Haldane contended that so long as the notarial act was not set aside upon an improbation, evidence to contradict it was inadmissible; and he referred to arts. 1208, 1210 and 1211 of the Code in support of this contention. But the notarial act in this case does not say for whom the money was borrowed; it merely says that the money was lent, paid and advanced to the wife, which was perfectly true. The effect of a notarial act has been much discussed in Lower Canada; see *Cossette* v. *Vinet*[1]; and although it seems settled that a notarial act is conclusive proof that the facts stated in it were stated to the notary and were accepted by him to be true, it does not appear settled that the truth of those facts cannot be controverted except in an improbation proceeding. However this may be, and assuming that the notarial act in this case should be accepted as complete proof of what is stated in it, their Lordships do not think it follows that it should be accepted as complete proof of anything else; and they decline to accept it as complete proof of what might be naturally inferred from it if no further evidence were forthcoming.

Another point raised by Mr. Haldane was that, assuming art. 1301 to apply, it only affected the debt contracted by Madame Corriveau and not the disposition of her property, and he contended that the plaintiffs could at all events hold the property hypothecated by her until they were repaid their advance with interest. If their Lordships were dealing with an English mortgage without the assistance of a Court of Equity, this contention would deserve attention. But the Canadian law of hypothec is totally different from the English law of mortgage, and if there is no debt there is no hypothec; see art. 2017. Moreover, art. 1301 avoids the whole obligation and this word covers the hypothecation.

HYPOTHEC.

PAYMENT.

TRUST AND LOAN COMPANY OF CANADA v. GAUTHIER.[2]

1. The Canadian French law is different from the English law with respect to the payment of an hypothecary obligation. In the French law if there is no debt there is no hypothec.

1 R J Q, 7 Q B, 512.

2 Quebec, aff, 3rd November, 1903. L R., 1904, App. Cas., 94; 20 T. L. R., 15.

LORD LINDLEY, page 102:—Another point raised by Mr. Haldane was that, assuming article 1301 to apply, it only affected the debt contracted by Madame Corriveau and not the disposition of her property, and he contended that the plaintiffs could, at all events, hold the property hypothecated by her until they were repaid their advance and interest. If their Lordships were dealing an English mortgage which the mortgagor could not get back from his mortgagee without the assistance of a Court of Equity, this contention would deserve attention. But the Canadian law of hypothec is totally different from the English law of mortgage, and if there is no debt there is not hypothec; see art. 2017.

PROHIBITION TO ALIENATE.

JOSEF ET AL. V. MULDER ET AL.[1]

2. Where real property is vested in any person subject to a prohibition against its alienation, either by act *inter vivos*, or by will, to any person not a member of the family of the settlor:—

3. It was held that a mortgage, being a mere charge not passing the *dominium*, is not a breach of the prohibition, and is therefore not invalid.

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1 Cape of Good Hope, aff., 10th February, 1903, 88 L. T. R., 72

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INSOLVENCY.

ASSISTANCE IN TRADE.

ADMINISTRATOR-GENERAL OF JAMAICA v. LASCELLES.[1]

1. A bill of sale, including the whole of a trader's property given as security for an advance with a promise of further assistance made in good faith, to enable him to carry on his business, and in the reasonable belief that he will thereby be enabled to do so, is not a fraudulent assignment and an act of bankruptcy, though the trader was insolvent, in fact, at the time of giving it.

DISTRIBUTION OF ASSETS.

MOLSONS BANK v. SMITH ET AL.[2]

2. The appellants lent money on securities to a firm which subsequently failed. Having realized the securities, they nevertheless sought to recover judgment for the whole indebtedness, so that they might obtain a larger dividend in the bankruptcy. Held, that they could not do so.

PAYMENT.

NATIONAL BANK OF AUSTRALASIA v. MORRIS.[3]

3. A creditor receiving payment having knowledge of circumstances from which the ordinary men of business would conclude that his debtor is unable to meet his liabilities knows that the debtor is insolvent.

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1 Jamaica, aff., 3rd February, 1894, 70 L. J. R., n.s., 179.
2 Supr. C., Canada, Toronto, 9th March, 1898, 14 T. L. Rep., 276.
3 New South Wales, 13th February, 1892, 66 L. T. R., 240; 61 L. J. R., n.s., 32.

PRIORITY OF MORTGAGE.

THE STANDARD BANK OF SOUTH AFRICA v. HEYDENRYCH.[1]

4. Though a general bond given to secure future advances is prior in date of execution and of registration to another bond, preference is to be determined by the date of the debts and not of the securities, and a security earlier in point of date, but under which no advance has been made, must give place to one later in point of date, but given for an actual advance made before an advance has been made under the earlier security.

REGISTRATION.

MORRIS v. MORRIS.[2]

5. The appellant made an advance in good faith to C, who was at the time solvent, and took a bill of sale as security. The bill of sale was not registered at the wish of the appellant. C afterwards became bankrupt, and the appellant did not take possession under the bill of sale till just before the bankruptcy.

6. The bill of sale was not void as having been made with intent to defeat or delay creditors.

LORD HERSCHELL, page 881:—But when the Legislature determined to interfere with secret bills of sale they did not render all assignments void unless accompanied by delivery or followed by registration. The operation of the Bill of Sale Act was much more limited. The learned Chief Justice of the Supreme Court relied much on the case of *Re Ash*.[3] In that case a bill of sale was given respect of an antecedent debt and at a time when the grantor was in a condition of insolvency. It was, therefore, *prima facie*, bad. It was sought to validate it upon the ground that the advance had been made on a promise that a bill of sale should be given, and that the sum advanced was therefore to be treated as a present advance on the security of that instrument. The court, whilst admitting that as a general rule, this would be so, thought that the rule did not protect transactions where the giving of a bill of sale was purposely postponed until the trader was in a state of insolvency in order to prevent the destruction of his credit, which would result from registering a bill of sale. The Chief Justice said in his judgment in the present case that there was a close analogy between the case of postponing the giving of a bill of sale and postponement in entering into possession. Their

1 Cape of Good Hope, aff., 21st June, 1907, 23 T. L. R., 679

2 New South Wales, rev., 3rd July, 1895, 72 L. T. R., 879; 64 L. J. R., n.s., 136; 44 W. Rep., [illegible]

3 26 L. T. Rep., 931, L. Rep., 7 ch., 636

Lordships cannot agree with this view. In the case relied on the bill of the sale was given by an insolvent person without any present advance and of itself could not avail the grantee. He invoked the aid of a prior promise made at the time of the advance, but for the reasons given the court held that he could not derive any benefit from this promise. In the case under the appeal the bill of sale was granted in respect of a present advance by a person not shown to be insolvent. The title of the grantee was then complete and did not depend upon his taking possession, though, owing to his not doing so, the provisions of the Bills of Sale Act might in certain events have deprived him of the security. Beyond this his title was unaffected by it.

LOSS OF BENEFIT OF THE TERM.

KENSINGTON LAND COMPANY v. CANADA INDUSTRIAL COMPANY.[1]

7. Under article 1092 of the Civil Code of Lower Canada an action to recover the balance of purchase money of land may be brought, although the time for payment has not arrived when the debtor has become insolvent, or has diminished the value of the security for his debt.

See LEGISLATURE: *Eod. vo.*; PAYMENT: *Insolvency of debtor*; PRIVILEGE: *Lessor's privilege in case of insolvency.*

INSURANCE (FIRE).

ADDITIONAL INSURANCE.

EQUITABLE FIRE AND ACCIDENT OFFICE v. THE CHING WO HONG.[2]

1. Where there was a stipulation in a policy of fire insurance that it should become null and void if the insured omitted to give notice of an additional assurance effected on the same goods with another company without the consent of the insurers:—

2. It was held that the policy was not voided by omission to give notice of an additional assurance which, on the true construction of its terms, never became effective by reason of the premium not having been paid.

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1 Quebec, aff., 28th March, 1902, L. R., 1903 App. Cas., 213; 88 L. T. R., 711; 72 L. J. R., n.s., 66.

2 China and Corea, aff., 19th December, 1906, L. R., 1907, App. Cas., 96; 23 T. L. R., 300; 76 L. J., n.s., 31; 96 L. T. R., 6.

LORD DAVEY, page 100:—The Judicature Act provides that where the rules of law and of equity differ, the rules of equity shall prevail. It is familiar law that in equity a vendor was never held to be estopped by a statement in the conveyance that the purchase money had been paid, or even by an indorsed receipt for the money signed by him, so as to exclude the enforcement of the vendor's lien. Their Lordships think that in any case the parties should not be held in equity to be estopped as between themselves from showing that the consideration had not, in fact, been paid. But in the present case they think that the condition read with the operative part of the instrument negatives any such estoppel, for the only meaning which can be given to the words is that the consideration must be not only expressed to be paid, but actually paid. Their Lordships cannot treat the fact of the executed policy having been handed to the respondents as a waiver of the condition or attach any importance to the circumstance. What was handed to the respondents was the instrument with this clause in it, and that was notice to them, and made it part of the contract that there would be no liability until the premium was paid. It is not a question of conditional execution, but of the construction of what was executed.

EVIDENCE.

DAVIES v. NATIONAL FIRE AND MARINE INSURANCE CO. OF NEW ZEALAND.[1]

3. Where a contract of insurance is reduced to writing, the terms cannot be qualified by evidence of an alleged oral contract made prior to the policy.

RE-INSURANCE.

HOME INSURANCE CO. OF NEW YORK v. VICTORIA-MONTREAL FIRE INSURANCE CO.[2]

4. Where a re-insurance was effected by attaching a typewritten slip containing the special terms of the re-insurance to a printed form of fire insurance policy which contained terms foreign to the purposes of a re-insurance contract, inconsistent with the special terms contained in the slip, and in some cases in conflict with them:—

5. Though the slip, while complete in itself, apparently incorporated the terms of the fire policy in the re-insurance

1 New Zealand, aff., 4th July, 1891, 60 L. J. R., n.s., 73.
2 Supr. Ct. Canada, Quebec, rev., 2nd November 1906, 37 L. T. Rep. 637; 23 T. L. R., J. 29; 76 L. J., n.s., 1

policy, it must be held to have been engrafted upon it only for the purpose of indicating the origin of the direct liability on which the subject of the re-insurance would depend, and setting forth the conditions attached to it; and, therefore, a condition in the printed form that an action must be brought within twelve months after the fire did not apply to the contract of re-insurance.

LORD MACNAGHTEN, page 658:—Among the separate stipulation or clauses, over twenty in number, in the printed form there is the following: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." The action in the present case was not commenced within twelve months next after the fire. It is not suggested on behalf of the respondents, who are now in liquidation, that it was obligatory upon the Home Insurance Company, or even possible for them, to comply with the requirements in the printed form described as "the foregoing requirements," but it is contended that the clause prescribing suits or actions after the expiration of one year is applicable, or, at least, not inapplicable, to the contract of re-insurance, and that the action must consequently fail. The Trial Judge and the Court of Review held the action maintainable. In the Supreme Court the learned judges were divided in opinion, and the judgment below was reversed, Girouard and Nesbitt, JJ., dissenting. It is, no doubt, possible to read the sentence prescribing suits and actions, divorced from its immediate context, into the contract of re-insurance. But it will be observed that the typewritten slip is complete in itself. It contains all that is required for a re-insurance contract. If the sentence in question be read upon it, the printed form upon which the slip engrafted will after all add nothing to the agreement but one unreasonable condition. The rest of the printed form is foreign to the purposes of a re-insurance contract, inconsistent with the special terms contained in the slip, and in some places in direct conflict with its provisions. It will also be observed that the slip does specify a series of cases in which no claim can be made under the policy. It may fairly be presumed that if it had been in the minds of the parties to exclude claims for loss in any other case, that case would have been specified in the same connection. To specify there all cases but one, and to leave that one to be discovered in another part of the instrument among a multitude of irrelevant provisions, is (to say the least) somewhat misleading.

A clause prescribing legal proceedings after a limited period is a reasonable provision in a policy of insurance against direct loss

to specific property. In such a case the insured is master of the situation. He can bring his action immediately. In a case of re-insurance against liability the insured is helpless. He cannot move until the direct loss is ascertained between parties over whom he has no control, and in proceedings in which he cannot intervene. If the respondents are right and honest, claim might be defeated in such a case as this without any default or delay on the part of the insured owing to unavoidable difficulties or complications, or possibly in consequence of some dilatory proceeding prompted by the very person in whose favour time is running. It is difficult to suppose that the contract of re-insurance was engrafted on an ordinary printed form of policy for any purpose beyond the purpose of indicating the origin of the direct liability on which the indirect liability, the subject of the re-insurance, would depend, and setting forth the conditions attached to it. In the result their Lordships have come to the conclusion that according to the true construction of this instrument, so awkwardly patched and so carelessly put together, the condition in question is not to be regarded as applying to the contract of re-insurance. To hold otherwise would, in their opinion, be to adhere to the letter, without paying due attention to the spirit and intention of the contract. The question does not seem to have been raised before this in Canada. In the United States, though the point has not been brought before the Supreme Court, the universally accepted opinion appears to be that a clause such as that in question in this case is not applicable to a re-insurance policy, and there are several decisions to that effect. Their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment of the Supreme Court discharged with costs, and the judgment of the Court of Review restored.

See the following cases which were cited in the court below: *Jackson* v. *St. Paul Fire Insurance Company*;[1] *Manufacturers' Fire and Marine Insurance Company* v. *Western Assurance Company*;[2] *Faneuil Hall Insurance Company* v. *Liverpool, London and Globe Insurance Company*;[3] *Imperial Fire Insurance Company of London* v. *Home Insurance Company of New Orleans*;[4] *Insurance Company of State of New York* v. *Associated Manufacturers' Mutual Fire Insurance Corporation*;[5] *Alker* v. *Rhoades*,[6]

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1 99 N. Y., 124

2 145 Mass., 419.

3 153 Mass., 63

4 63 Fed Rep., 698.

5 70 App. Div. Rep., N. Y., 69

6 73 App Div. Rep. N. Y., 158.

SUBROGATION.

KING v. VICTORIA INSURANCE CO.[1]

6. A claim for unliquidated damages arising out of a *tort* is a legal chose in action which can be assigned by virtue of sect. 5, sub-sect. 6, of the Queensland Judicature Act (40 Vict., ch. 86), which is in the same words as sect. 25 of the English Judicature Act of 1873.

7. Where insurers have honestly made a payment under a policy in satisfaction of a claim, they are entitled to all the remedies open to the insured, and may sue a third party who has caused the loss in their own name, and it is not open to such third party to contend that the loss was not within the policy, and that the insurers might have successfully disputed their liability.

INSURANCE (LIFE).

INSURABLE INTEREST.

ANCIL v. MANUFACTURERS LIFE INSURANCE CO.[2]

8. In an action on a policy of life insurance, it was held that the plaintiff was not a lawful holder. As "the protector of the deceased, whenever he stood in need of protection," he had not an insurable interest in his life within the meaning of article 2590 of the Civil Code of Lower Canada.

9. A condition in the policy that the same should, on the lapse of a year or upwards, during which premiums have been regularly paid, become incontestable, is no answer to an objection founded on the terms of the Code.

LORD WATSON, page 608:—In the first place, it must be observed that, although the terms of the policy, and of the proposals upon which it is based, are such as to cast upon him the onus of proving that he had an insurable interest, that appellant has not in his pleadings alleged, and has not attempted to establish by proof that he possessed any such interest, as is required in art. 2590 of the Code. The only contribution, if it can be so called, is that inquiry made by the testimony of the appellant consisted in the assertion that his wife's grandmother was the *cousin-germain* of Antoine Pettigrew. That is the evidence upon which the jury, in answer to question 8 (*b*) found that there was "distant relationship" between Pettigrew and the appellant.

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1 Queensland, aff., 20th March, 1896, 74 L. T. R., 206; L. R., 1896, App. Cas., 250; 65 L. J. R., n.s. 38.

2 Supr. Ct. Canada, Quebec, aff., 28th July, 1899, L. R., 1899 App. Cas., 604, 81 L. T. R., 279, 68 L. J. R., n.s., 123.

Page 609:—Their Lordships are of opinion, with the majority of the learned judges of the Supreme Court, that the findings of the jury are in themselves sufficient to establish that the appellant is not a lawful holder of the policy in question within the meaning of art. 2590 of the Code. The question remains whether the clause of the policy which provides that the instrument shall become "incontestable" on the lapse of the period of a year or upwards, during which premiums are regularly paid, furnishes a good answer to the objection founded on the terms of the Code. Upon that point their Lordships concurred in the opinion expressed by the majority of the Supreme Court, and of the Superior Court sitting in review. The rule of the Code appears to them to be one which rests upon general principles of public policy or expediency, and which cannot be defeated by the private convention of the parties. Any other view would lead to the sanction of wager policies.

PREMIUM.

LONDON AND LANCASHIRE LIFE ASSURANCE CO. v. FLEMING.[1]

10. Where a life policy contains provisions to the effect that it shall not be in force till the first premium is paid, and that if a note be taken for the first or renewal premium and not paid the policy is void at and from default, the onus is on the policyholder to prove cash payment of the premium:

11. Where the insurers' agent accepts in payment of a premium a note which is not paid when due, there is no presumption that he was to raise money thereon as an agent for the insured and pay the premium out of the proceeds.

12. And where the insurers accept their agent's note in discharge of an account between them, in which the agent was debited with the amount of the premium, that affords no presumption of an intention to treat their own agent as agent for the insured, or the insurance subsisting contrary to the terms of their contract with the policyholder.

INSURANCE (MARINE).

UNSEAWORTHINESS.

AJIMS SOOLAM HOSSEN & CO. v. UNION MARINE INSURANCE CO.[2]

13. Where a vessel capsized and sank in less than twenty-four hours after leaving port, without having encountered any

1 Ontario, rev., 3rd August, 1897, L R., 1897, App. Cas., 499; 66 L. J R., n.s., 116; 13 T. L. Rep, 572.

2 Mauritius, rev., 2nd March, 1901, L R, 1901, App Cas, 362; 84 L. T. R, 366; 70 L. J. R., n s, 34; 17 T. L. Rep., 376.

storm or other known cause sufficient to account for the catastrophe, there is a presumption of unseaworthiness on which a jury may be directed to act in the absence of evidence. Where evidence is given, all the facts must be considered, including the unexplained sinking, and unless it establishes unseaworthiness the defence founded on it must fail.

14. The defence in this case was overruled, since the real cause of the loss was not ascertainable on the evidence, though it appeared to be attributable to mistakes made in managing the vessel after she sailed rather than to her unseaworthiness when she sailed.

LORD LINDLEY, page 366:—The underwriters have the advantage of the undoubted fact that the vessel capsized and sank in less than twenty-four hours after leaving port, without having encountered any storm or other known cause sufficient to account for the catastrophe; and there is no doubt that if nothing more were known, they would be entitled to succeed in the action. If nothing more were known, unseaworthiness at the time of sailing would be the natural inference to draw; there would be a presumption of unseaworthiness which a jury ought to be directed to act upon, and which a court ought to act upon if unassisted by a jury.

The law on this point was finally settled in *Pickup* v. *Thames and Mersey Marine Insurance Company*,[1] which followed *Anderson* v. *Morice*.[2] In these cases the court pointed out the danger and error of acting on the presumption in favour of unseaworthiness in case of an early loss of which the assured cannot prove the cause; and the court pointed out the necessity of bearing in mind that the defence of unseaworthiness must be overruled unless supported by a sufficient weight of evidence in its favour after duly considering all the evidence bearing on the subject, including, of course, the very weighty evidence with which the underwriters start their case.

INTEREST.

IN CASE OF FRAUD.

JOHNSON v. THE KING.[3]

1. Money obtained by fraud and retained by fraud can be recovered with interest whether proceedings be taken in a court of equity or in a court of common law, but where the

1 39 L. T. Rep., 341; Q. B. Div., 594.
2 31 L. T. Rep., 605; L. Rep., 10 C., page 58.
3 Siena Leone, rev., 19th July, 1904, 53 W. Rep., 207.

Crown in a civil action intentionally and deliberately put aside all charges or fraud no interest was allowed.

JURISDICTION OF JUDICIAL COMMITTEE.

See APPEAL: *Further order to pay interest*; STATUTES: *Construction*, "Interest."

INTERNATIONAL LAW.

ALIEN.

DE JAGER v. ATTORNEY-GENERAL OF NATAL.[1]

1. The protection afforded by a State to a resident alien does not cease simply because for a time the State forces are withdrawn and the enemy is in possession and exercises the rights of an army in occupation. And when the territory so occupied reverts to the control of its rightful sovereign, wrongs done during the foreign occupation are cognizable by the ordinary courts, and an alien who has aided the enemy may be tried and punished for high treason.

CHANGE OF SOVEREIGNTY.

COOKAL v. SPRIGG.[2]

2. According to the rules of international law, a change of sovereignty by cession from one power to another does not affect private property in the ceded territory, but no municipal tribunal has authority to enforce such an obligation.

LORD HALSBURY, L.C., page 283:—It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well understood bargain between the ceding potentate and the government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure.

1 Natal, 1907, 76 L.J., n.s., 62.
2 Cape Colony, aff., 1st August, 1899, 81 L.T.R., 281

CONTRACT.

SPURRIER v. LA CLOCHE.[1]

3. Where the parties to a contract reside in different countries in which different systems of law prevail, their intention is the true criterion to determine by what law its interpretation and effect are to be governed.

LORD LINDLEY, page 450:—The first question which arises is whether this is to be regarded as an English contract or as a Jersey contract. Their Lordships are of opinion that, although this policy was made in Jersey, and any money payable under it would have to be paid to the assured in Jersey, the nature of the transaction, the language in which the policy is expressed, and the terms of the agreement and of the conditions, all show that the contract between the parties is an English contract, and that wherever suit upon its interpretation and effect ought, as a matter of law, to be governed by English and not by Jersey law. The intention of the parties is too plain to be mistaken: the contract to pay out of the fund of the company is of itself very significant; and the reference to the English Arbitration Acts shows that the arbitration proceedings were to be conducted according to English law and no other. That the intention of the parties to a contract is the true criterion by which to determine by what law it is to be governed is too clear for controversy: see *Hamlyn & Co.* v. *Talisker Distillery*,[2] and the intention here is unmistakable.

EXTERRITORIALITY.

SECRETARY OF STATE v. CHARLESWORTH ET AL.[3]

4. Where, by a treaty, rights of exterritoriality are conferred upon British subjects as regards their persons and property, land purchased by a British subject is not stamped with the same character and attended by the same incidents as if it were land in England, but its incidents are governed by the law of its site, and the local law applies to compensation for unauthorized encroachments on it.

FOREIGN JUDGMENT.

HUNTINGTON v. ATTRILL.[4]

5. To an action by the appellant in an Ontario Court upon a judgment of a New York Court against the respondent under

1 Jersey, rev., 14th May, 1902, L. R., 1902, App. Cas., 446; 71 L. J. R., n.s., 101, 18 T. L. Rep., 607.
2 1894, App. Cas., 212.
3 Zanzibar, rev., 16th February, 1901, 84 L. T. R., 212.
4 Ontario, 17th February, 1892, L. R., 1893, App. Cas., 150; L. J. R., n.s., 44; 41 W. Rep., 574; 8 T. L. Rep., 341.

section 21 of New York State Laws of 1875, ch. 611, which imposes liability in respect of false representations, the latter pleaded that the judgment was for a penalty inflicted by the municipal law of New York, and that the action being of a penal character, ought not to be entertained by a foreign court:

6. It was held, that the action being by a subject to enforce in his own interest a liability imposed for the protection of his private rights was remedial and not penal in the sense pleaded. It was not within the rule of international law which prohibits the court and one country from executing the penal laws of another, or enforcing penalities recoverable in favour of the State.

7. Held, further, that it was the duty of the Ontario Court to decide whether the statute in question was penal within the meaning of the international rule so as to oust its jurisdiction; and that such court was not bound by the interpretation thereof adopted by the Courts of New York.

Lord Watson, page 155:—Their Lordships cannot assent to the proposition that in considering whether the present action was penal in such sense as to oust their jurisdiction, the Court of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the Statute of 1875 of the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign court whose jurisdiction is revoked. Judicial decisions in the States where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The court appealed to must determine for itself in the first place the substance of the right sought to be enforced; and in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of the State. Were any other principle to guide its decisions, a court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal.

The general law upon this point has been correctly stated by Mr. Justice Story in its "conflict of laws," and by other text writers; but their Lordships do not think it necessary to quote

from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, some of these have their rights in a foreign country. The rule has its foundation in the well recognized principles that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise at the instance of the State Government or of some one representing the public, are local in the sense that they are only cognizable and punishable in the country where they were committed. Accordingly, no proceeding, even in the shape of a civil, which has for its object the enforcement of the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori* ought to be admitted in the courts of any other country.

Their Lordships have already indicated that in their opinion the phrase "penal actions," which is so frequently used to designate that class of actions which, by law of nations are exclusively assigned to their domestic forum, does not afford an accurate definition. In its ordinary acceptation the word "penal" may embrace penalties for infractions of general law which do not constitute offences against the State; it may, for many legal purposes be applied with perfect propriety to penalties created by contracts; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrong with that distinction which is the very essence of the international rule. The phrase used by Lord Loughborough and Mr. Justice Buller in a well known case, *Folliot v. Ogden*,[1] and *Ogden v. Folliot*,[2] and also by Chief Justice Marshall who, in the *Antelope*[3] thus stated the rule with no less brevity than force: "The courts of no country execute the penal laws of another." Read in the light of the context of the language used by these eminent lawyers is quite intelligible because they were dealing with the consequences of violations of public law and order which were unmistakably of a criminal complexion. But the expressions "penal" and "penalty," when employed without any qualification expressed and implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceeding for the recovery of penalties, whether exigible by the State in the interest of the community, or by private persons in their own interest.

The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin v. The Pelican Insurance Company*.[4] By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon a corporation carrying on business under it who failed to comply with one of its enactments.

1 1 H. Bl., 135
2 3 T. R., 734
3 10 Wheaton, 123
4 127 United States (20 Davies), 265

The penalty was recoverable by the commissioner of the insurance, an official intrusted with the administration of the Act in the public interest, one-half of it being payable into the State Treasury, and the other to the commissioner, who was to defray the cost of prosecution. It was held that the penalty could not be enforced by the Federal Court or the Judiciary of any other State. In delivering the judgment of the bench, Mr. Justice Gray, after referring to the text books and the dictum by Chief Justice Marshall already cited, went on to say: "The rule that the courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of peculiar penalties for any violation of Statutes for the protection of its revenue or other municipal laws and to all judgments for such penalties."

ASHBURY v. ELLIS.[1]

8. Where the judgment of a foreign tribunal come to be enforced in another country, its effect must be judged of by the courts of that country with regard to all circumstances of the case.

PROVISION OF TREATY.

WALKER v. BAIRD.[2]

9. A naval officer, in the alleged performance of his duty, took forcible possession of a factory belonging to the respondent, in order to put in force and give effect to the provisions of a treaty entered into with a foreign State.

Held, that such an act could only be justified on the ground that it was done by the authority of the Crown for the purpose of enforcing obedience to the treaty, and could not be justified as an act of State.

10. It was held further, that the court of the colony was competent to inquire into matters involving the construction of treaties and other acts of State.

LORD HERSCHELL, page 515:—The power of making treaties of peace is, as he truly said, vested by our Constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so the

1 New Zealand, off., 17th June, 1903, 62 L. J. R., n.s., 107.
2 Newfoundland, off., 4th August, 1892, 67 L. T. R., 513

power must equally extend to the provisions of a treaty having for its object the preservation of peace, that an agreement which was arrived at to avert a war which was imminent, was akin to a treaty of peace and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace, and whether, if so, it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorized otherwise than by the Legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion. Their Lordships agree with the court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition for which alone the appellant's counsel contended.

JURISDICTION: *Lands situated in another province.*

INTERVENTION.

UNDER ARTICLE 997 CANADIAN CODE OF CIVIL PROCEDURE.

CASGRAIN V. ATLANTIC AND NORTH-WEST RY. CO.[1]

1. There is doubt whether in an action brought by the Attorney-General under art. 997 of the Code of Civil Procedure, any other party is entitled to appear and prosecute as an intervener under art. 154 of same code.

LORD WATSON, page 372:—In the course of that argument, the legality and propriety of their admission to the suit as interveners were fully discussed. Their Lordships entertain doubts whether, in an action brought by the Attorney-General under art. 997, any other party can be entitled to appear and prosecute as an intervener, in terms of article 154 of the code. Even more doubtful is their right to prosecute a claim of damages which was not within the conclusions of the original writ. But if the absence of the city council, who are out of the case, and seing that now neither the appellant nor the respondent company have any real interest in its determination their Lordships abstain from deciding the point

1 Quebec, aff., 9th February, 1895, 73 L. T. R. 369; L. R., 1895, App. Cas., 282

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JURISDICTION.

LANDS SITUATED IN ANOTHER PROVINCE.

GREAT NORTH-WEST CENTRAL RY. v. CHARLEBOIS ET AL.[1]

1. The sale of land situated in one province cannot be conducted, nor can possession be given by a court in another province. Nor has either the Supreme Court of Canada, or His Majesty-in-Council sitting in appeal, any wider jurisdiction.

CASGRAIN v. ATLANTIC AND NORTH-WEST RAILWAY CO.[2]

2. The court has jurisdiction under article 998 of the Code of Civil Procedure, to prohibit the issue of a writ of information under article 997; but after issue the Attorney-General is

1 Supr. C., Canada, Ontario varied, 1st April, 1878, 68 L. J. R., n.s., 25; 79 L. T. R., 35

2 Quebec, aff., 9th February, 1895, L. R., 1895 App. Cas., 282

dominus litis, and can discontinue proceedings or control their conduct and settlement independently of any private relator.

See CORPORATION (*Company*): *Jurisdiction of courts*; EXTRADITION: *Jurisdiction*; JURY TRIAL: *Jurisdiction of the Court of Review*; MARTIAL LAWS: *Eod. vo.*; PARISHES (*Catholic*): *Canonical and Civil jurisdiction*; PRACTICE: *Jurisdiction to correct error*; RAILWAY: *Jurisdiction of Court.*

JURY TRIAL.

JURISDICTION OF THE COURT OF REVIEW.

McARTHUR v. DOMINION CARTRIDGE CO.[1]

1. The function of the Court of Review in the Province of Quebec is, under the Civil Procedure Code, where an application is made for judgment of a new trial, the same as that of the Court of Appeal in England.

LORD MACNAGHTEN, page 31:—The learned judge who presided at the trial reserved the case, as he was authorized to do by the Civil Procedure Code, for the consideration of the Court of Review. That court dismissed with costs a motion on behalf of the company for judgment or a new trial, and confirm the verdict in favour of the plaintiff. No complaint was made of the learned judge's summing-up or the way in which the questions were left to the jury.

In Quebec, when an unsuccessful party, after verdict, moves for judgment or a new trial, the function of the court under the Civil Procedure Code is the same as the function of a Court of Appeal in this country in similar circumstances. It is not the province of the court to re-try the question. The court is not a Court of Review for that purpose. The verdict must stand if it is one which the jury, as reasonable men, having regard to the evidence before them, might have found, even though a different result would have been more satisfactory in the opinion of the trial judge and the Court of Appeal.

NEW TRIAL.

CLOUSTON ET AL. v. CASEY.[2]

2. When the ground of the verdict is very unsatisfactory, a new trial will be granted.

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1 Supr. C., Canada, Quebec, rev., 11th November, 1904, 74 L. J. R., n.s., 30.

2 New Zealand, rev., 1st December, 1905, 22 T. L. Rep., 107

GEORGE D. EMERY CO. v. WELLS.[1]

3. Where no application for a new trial has been made to the court below, the Judicial Committee will not allow an appellant to raise any contention directed to a new trial, but he will be confined to the question whether the findings justify the judgment delivered.

NON SUIT.

HIDDLE & CO. v. MARINE INSURANCE CO., OF NEW ZEALAND.[2]

1. In a case where, though there is some evidence to go to the jury, yet it is of such a nature that the jury could not reasonably give a verdict for the plaintiff, the judge is justified in directing a non-suit.

See PRACTICE: *Jury trial.*

1 British Honduras, aff., 24th June, 1906, 95 L. T. Rep., 589.
2 New South Wales, aff., 20th March, 1896, 74 L. T. R., 294.

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LEASE.

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LEGISLATURE.

LEGISLATIVE POWERS: "ALIENS."

ATTORNEY-GENERAL FOR CANADA v. CAIN.[1]

1. The section 6 of the Dominion Statute, 60 and 61 Vict., ch. 11, as amended by 1 Edw. VII., ch. 13, sect. 13, is *intra vires* of the Dominion Parliament.

2. The Crown undoubtedly possessed the power to expel an alien from the Dominion of Canada, or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dominion Government which includes and authorizes them to impose such extra-territorial constraint as is necessary to execute the power.

LORD ATKINSON, page 545:—The validity of sect. 6 was impeached on several grounds, and was held to transcend the powers of the Dominion Parliament, inasmuch as it purported to authorize the Attorney-General or his delegate to deprive persons against whom it was to be enforced of their liberty without the territorial limits of Canada, and upon this point alone the decision of the case turned. It was conceded in argument before their Lordships on the principle of law laid down by this Board in the case of *Macleod* v. *Attorney-General for New South Wales*,[2] that the statute must, if possible, be construed as merely intending to authorize the deportation of the alien across the seas to the country whence he came, if he was imported into Canada by sea, or if he entered from an adjoining country, to authorize his expulsion from Canada across the Canadian frontier into that adjoining country. The judgment of the learned judge was, in effect, based upon the practical impossibility of expelling an alien from Canada

1 Ontario, rev., 27th July, 1906, L. R., 1906, App. Cas., 542; 12 R. L., n.s., 293; 22 T. L. Rep., 757; 95 L. T. Rep., 314; 79 L. J., P. C., n.s., 81.
2 1891, App. Cas., 455, page 459.

into an adjoining country without such an exercise of extra-territorial constraint of his person by the Canadian officer as the Dominion Parliament ould not authorize. No special significance was attached to the word "return." The reasoning of the judgment would apply with equal force if the word used had been "expel," or "deport," instead of "return."

In 1763 Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any time been held or acquired by the Crown of France were ceded to Great Britain: *St. Catharine's Milling and Lumber Co.* v. *Reg.*[1] Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and save so far as it has since parted with these powers by legislation, royal proclamation or voluntary grant, it is still possessed of them. One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State at pleasure even a friendly alien, especially if it considers his presence in the State opposed to its peace order, and good government, or to its social or material interest: *Vattel, Law of Nations.*[2] The Imperial Government might delegate those powers to the governor or the government of one of the Colonies, either by royal proclamation, which has the force of a statute, *Campbell* v. *Hall,*[3] or by a statute of the Imperial Parliament, or by statute of a local parliament to which the Crown has assented. If this degelation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. The following cases establish these propositions: *In re Adam*[4]; *Donegani* v. *Donegani*[5]; *Cameron* v. *Kyte*[6]; *Jephson* v. *Riera.*[7] But as it is conceded that by the law of nations the supreme power in every State has the right to enforce those laws, it necessarily follows that the State has the power to do those things which must be done in the very act of expulsion if the right to expel is to be exercised effectively at all, notwithstanding the fact that constraint upon the person of the alien outside the boundaries of the State or the commission of a trespass by a State officer on the territories of its neighbour, in the manner pointed out by Anglin, J., in judgment should

1 1888, 14 App. Cas., 46, 53.
2 Book 1, s. 231; Book 2, s. 125
3 1774, 1 Cowper, 204.
4 1837, 1 Moo. P. C., 460, 472-6.
5 1835, 3 Knapp, 63, 88.
6 1835, 3 Knapp, 332, 343.
7 1835, 3 Knapp, 130.

thereby result. Accordingly, it was *In re Adam*[1] definitely decided that the Crown had power to remove a foreigner by force from the Island of Mauritius, though, of course, the removal in that case would necessarily involve an imprisonment of the alien outside British territory in the ship on board of which he would be put while it traversed the high seas.

The question therefore for decision in this resolves itself into this: Has the Act 60 Vict., ch. 11, assented to by the Crown, clothed the Dominion Government with the power the Crown itself therefore undoubtedly possessed to expel an alien from the Dominion, or to deport him to the country whence he entered the Dominion? If it has, then the fact that extra-territorial restraint must necessarily be exercised in effecting the expulsion cannot invalidate the warrant directing expulsion issued under the provisions of the statute which authorizes the expulsion.

It has already been decided in *Musgrove* v. *Chun Teeong Toy*[2] that the Government of the Colony of Victoria, by virtue of the powers with which it was invested to make laws for the peace, order, and good government of the Colony, and authority to pass a law preventing aliens from entering the Colony of Victoria. On the authority of this case sec. 1 of the above-mentioned statute would be *intra vires* of the Dominion Parliament. The enforcement of the provisions of this section, no doubt, would involve the exercise of sovereign powers closely allied to the power of expulsion and based on the same principles. The power of expulsion is in truth but the complement of the power of exclusion. If entry be prohibited, it would seem to follow that the government which has the power to exclude, should have the power to expel the alien who enters in opposition to its laws. In *Hodge* v. *Reg.*[3] it was decided that a colonial legislature has within the limits prescribed by the statute which created it "an authority as plenary and as ample..... as the Imperial Parliament in the plenitude of its power possessed and could bestow." If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed their constraint for a similar purpose had the statute never been passed.

Their Lordships, therefore, think that the decision of Anglin, J., was wrong, and that the appeal should be allowed, and will so humbly advise His Majesty.

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1 1837, 1 Moore P. C., 460, 472-6.
2 1891, App. Cas., 272.
3 9 App. Cas., 117.

"CIVIL RIGHTS."

TENNANT v. UNION BANK OF CANADA.[1]

3. The British North America Act, 1867, 30 Vict., ch. 3, sect. 91, sub-sect. 15, gives the Parliament of Canada exclusive legislative authority with respect to "banking"; and by sect. 92, sub-sect. 14, gives the Provincial Legislature exclusive authority with respect to "property and civil rights in the province."

4. The expression "banking" embraces every transaction coming within the legitimate business of a banker, and the provisions of the Bank Act dealing with the hypothecation of warehouse receipts were not *ultra vires* the Dominion Parliament.

LORD WATSON, page 777:—The obvious effect of sect. 54 is that for the purposes of the Bank Act, a warehouse receipt by an owner of goods, who carries on as the firm did, the trade of a saw-mill, is to be as effectual as if it had been granted by his lessee, although his business may be confined to the manufacture of his own timber. That enactment plainly implies that such a receipt is to be valid not only in the hands of the bank, but in the hands of a borrower who gives it to the bank in security of a loan. Their Lordships do not think that the provisions of sect. 53 (2), which was somewhat obscure, can be held to cut down the plain enactments of sect. 54, especially in a case where the grantor of the receipt himself delivers it to the bank as a security for his own debt. It seems clear that the firm so long as they were solvent could not have refused to make delivery of all the timber in their possession to the respondents, although the legal ownership was still with the firm. But on that assumption, and assuming also that their trustee had no higher right than the insolvents, the question remains whether a creditor having an assignment from the trustee could plead the nullity enacted by chap. 125 of the Revised Statutes. Their Lordships before dealing with these questions thought it expedient to determine for themselves whether the provisions of the Bank Act, to which the appellant takes exception, were competently enacted. The appellant's plea against the legislative power of the Dominion Parliament was accordingly made the subject of further argument; and, the point being one of general importance, their Lordships had the advantage of being assisted in the hearing and consideration of it by the Lord Chancellor and Lord Macnaghten.

The question turns upon the construction of two clauses in the British North America Act, 1867. Section 91 gives the Parliament

1 Ontario, aff., 9th December, 1893, 69 L. T. R., 774; L. R., 1894, App Cas., 31; 63 L. J. R., n.s., 25.

of Canada power to make laws in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the legislature of the provinces, and also exclusive legislative authority in relation to certain enumerated subjects, the fifteenth of which is "Banking, incorporation of banks, and the issue of paper money." Section 92 assigns to each provincial legislature the exclusive right to make laws in relation to the classes of subjects therein enumerated; and the fourteenth of the enumerated classes is "property and civil rights in the province." Statutory regulations with respect to the form and legal effect in Ontario, of warehouse receipts and other negotiable documents which pass the property of goods without delivery unquestionably relate to property and civil rights in that province; and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shown that by the Act of 1867 the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by sect. 92. But sect. 91 expressly declares that, notwithstanding anything in this Act, the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the "enumerated classes"; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in sect. 91, are "patents of invention and discovery," and "copyrights." It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces.

This is not the first occasion on which the legislative limits laid down by sects. 91 and 92 have been considered by this Board. In *Cushing* v. *Dupuy*,[1] their Lordships had before them the very same question of statutory construction which has been raised in this appeal. An Act relating to bankruptcy, passed by the Parliament of Canada, was objected to as being *ultra vires*, in so far as it interfered with property and civil rights in the province: But, inasmuch as "bankruptcy and insolvency" form one of the classes of matters enumerated in sect. 91, their Lordships upheld the validity of the statute. In delivering the judgment of the Board, Sir Montagu Smith pointed out that it would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates, without interfering with and modifying some of the ordinary rights of property. The law being so far settled by precedent it only remains for consideration whether warehouse receipts taken in security by a bank in the course of the business

1 42 L. T. Rep., N. S., 445; 5 App. Cas., 409.

of banking are matters coming within the class of subjects described in sect. 91 (15) as banking, incorporation of banks, and the issue of paper money." If they are, the provisions made by the Bank Act with respect to such receipts are *intra vires*. Upon that point their Lordships do not entertain any doubt. The legislative authority conferred by these words is not confined to the mere construction of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province does not and cannot attach to it. It also comprehends "banking," an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker. The appellant's counsel hardly ventured to dispute that the lending of money on the security of goods or of documents representing the property of goods was a proper banking transaction. Their chief contention was that whilst the Legislature of Canada had power to deprive his own creature, the bank, of privileges enjoyed by other lenders under the provincial law, it had no power to confer upon the bank any privilege as a lender which the provincial law does not recognize. It might enact that a security, valid in the case of another lender, should be invalid in the hands of the bank, but could not enact that a security should be available to the bank which would not have been effectual in the hands of another lender. It was said in support of the argument that the first of these things did, and the second did not constitute an interference with property and civil rights in the province. It is not easy to follow the distinction thus suggested. There must be two parties to a transaction of loan; and if a security, valid according to provincial law, was made invalid in the hands of the lender by a Dominion statute, the civil rights of the borower would be affected, because he could not avail himself of his property in his dealings with a bank. But the argument, even if well founded, can afford no test of the legislative powers of the Parliament of Canada. These depend upon sect. 91, and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the province. And it appears to their Lordships that the plenary authority given to the Parliament of Canada by sect. 91 (15), to legislate in relation to banking transactions is sufficient to sustain the provisions of the Bank Act which the appellant impugns.

GRAND TRUNK RAILWAY OF CANADA v. ATTORNEY-GENERAL OF CANADA.[1]

5. The Dominion Parliament is competent to enact sect. 1 of Canadian Statute 4 Edward VII., ch. 31, which prohibits

1 Supr. C., Canada, aff., 5th November, 1906, L. R., 1907, App. Cas., 65; 95 L. T. Rep., 631; 76 L. J., n.s., 23.

"contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

6. That section is *intra vires* the Dominion, as being a law ancillary to through railway legislation, notwithstanding that it affects civil rights which, under the British North America Act, 1867, sect. 92, sub-sect. 13, are the subjects of provincial legislation.

LORD DUNEDIN, page 67:—The question in this appeal is as to the competency of the Dominion Parliament to enact the provisions contained in sect. 1 of Edw. VII., ch. 31, of the Statutes of Canada. These provisions may be generally described as a prohibition against any "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

It is not disputed that, in the partition of duties effected by the British North America Act, 1867, between the provincial and the Dominion legislatures, the making of laws for through railways is entrusted to the Dominion.

The point, therefore, comes to be within a very narrow compass. The respondent maintains, and the Supreme Court has upheld his contention, that this is truly railway legislation. The appellants maintain that, under the guise of railway legislation, it is truly legislation as to civil rights, and, as such, under sect. 92, sub-sect. 13, of the British North America Act, appropriate to the province.

The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894, viz., *Attorney-General of Ontario* v. *Attorney-General of Canada*,[1] and *Tennant* v. *Union Bank of Canada*,[2] seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation.

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1 1894, App. Cas., 189.
2 1894, App. Cas., 31.

It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature—which is admitted—it cannot be considered out of the way that the parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited, provisions relating to expropriation of land, conditions to be read into contracts of marriage, and alterations upon the common law of carriers.

In the factum of the appellants it is (*inter alia*) set forth that the law in question might "Prove very injurious to the proper maintenance and operation of the railway. It would tend to negligence on the part of employees, and other results of an injurious character to the public service, and the safety of the travelling public would necessarily result from such a far-reaching statute."

This argument is really conclusive against the appellants. Of the merits of the policy their Lordships cannot be judges. But if the applicants' factum properly describes its scope, then it is indeed, plain that it is properly ancillary to through railway legislation.

"DECENNIAL RE-ADJUSTMENT OF REPRESENTATION."

ATTORNEY-GENERAL FOR THE PROVINCE OF PRINCE EDWARD ISLAND v. ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.

7. The section 51 of the British North America Act, 1867, directs after each decennial census a readjustment of the representation in the Dominion House of Commons of the four provinces constituted by that Act.

It provides, as the rule of adjustment, that Quebec shall have the fixed number of sixty-five representatives, and that each of the other provinces shall have that number which bears to that of Quebec.

But its sub-sect. 4 prohibits a reduction of the number of the representatives in the case of any province, unless the proportion which the number of its population bore to the number

1 Supr. C., Canada, aff., 4th November, 1904, L. R., 1905, App. Cas., 37; 91 L. T. R., 636; 74 L. J. R., n.s., 9; 21 T. L. Rep., 25.

of the aggregate population of Canada at the last preceding readjustment is ascertained at the then latest census to have been diminished by one-twentieth part or upwards.

8. The Judicial Committee held, on a case submitted to the Supreme Court of Canada as to whether New Brunswick was protected from reduction of its members, that on the true construction of sub-sect. 4, the expression "aggregate population of Canada" relates to the whole of Canada as constituted by the Act, and, therefore, includes not merely the four provinces constituted by proclamation issued under sect. 3, but also all the provinces subsequently incorporated and admitted into the Union by Order-in-Council under sect. 146;

Held, also, with regard to the Province of Prince Edward Island, which had under sect. 146 been admitted into the Union by Order-in-Council directing that it should have six members, its representation to be readjusted from time to time under the provisions of the Act of 1867, that sub-sect. 4 on its true construction did not protect that number from reduction until an increase thereof had been previously effected.

Sir Arthur Wilson, page 45:—Canada, in the widest sense of the term, now comprises, in addition to the four original provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, three other provinces, which have entered the Dominion at various dates subsequent to its first formation, Manitoba, British Columbia, and Prince Edward Island. It also comprises certain territories which have not received the organization of provinces.

It will be convenient here to notice briefly certain of the circumstances connected with the admission of each of the new provinces into the Dominion, for some argument was based upon them. Manitoba was the first of the new provinces, and it was carved out of Rupert's Land and the North-western Territory referred to in sect. 146 of the British North America Act, 1867. An Order-in-Council, based upon an address as contemplated by that section was issued on June 24th, 1870, by which Rupert's Land and the North-western Territory were made part of the Dominion of Canada. In preparation for this Order-in-Council, at the time when it was expected but had not actually been issued, the Canadian Act, 33 Vict., ch. 3, was passed. It enacted that from the time when the expected Order-in-Council should incorporate Rupert's Land and the North-western Territory there should be carved out of them the Province of Manitoba.

It was added by sect. 2, that: "On, from and after the said day on which the Order of the Queen-in-Council shall take effect as aforesaid, the provision of the British North America Act,

1867, shall, except those which are in terms made, or by reasonable amendment may be held to be, especially applicable to, or only to affect one or more, but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba in the same way, and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act. The said province shall be represented, in the first instance, in the House of Commons of Canada, by four members, and for that purpose shall be divided by proclamation of the Governor-General into four electoral districts, each of which shall be represented by one member: Provided that on the completion of the census in the year 1881, and of each decennial census afterwards, the representation of the said province shall be readjusted according to the provision of the fifty-first section of the British North America Act, 1867."

This Canadian Act was affirmed and full validity given to it by the Imperial British North America Act, 1871 (34 and 35 Vict., ch. 28).

British Columbia was admitted into the Dominion by an Order-in-Council bearing date May 16th, 1871, which was based upon addresses as contemplated by sect. 146 of the Act of 1867, and embodied their terms. It is only necessary to refer to the following:—

Sect. 8: "British Columbia shall be entitled to be represented in the Senate by three members, and by six members in the House of Commons. The representation is to be increased under the provisions of the British North America Act, 1867."

Sect. 10: "The provision of the British North America Act, 1867, shall (except those parts thereof which are in terms made, or by reasonable amendment may be held to be, especially applicable to, and only affect, one and not the whole and the provinces now comprising the Dominion, and except so far as the same may be varied by this minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if the Colony of British Columbia had been one of the provinces originally united by the said Act."

Prince Edward Island was made part of the Dominion of Canada by Order-in-Council, dated June 26th, 1873, which, like its predecessor, was based upon, and embodied the terms of, the addresses contemplated by the statute. It is necessary to notice one clause (12):—

"That the population of Prince Edward Island having been increased by fifteen thousand or upwards since the year 1861, the island shall be represented in the House of Commons of Canada

by six members; the representation to be readjusted from time to time under the provision of the British North America Act, 1867."

With regard to the territories not included in provinces, it is sufficient to say that the Imperial British North America Act, 1886 (19 and 50 Vict., ch. 35), gave full power to the Canadian Legislature to provide for the parliamentary representation of territories, and Acts of the Canadian Legislature have from time to time conferred upon the inhabitants of the territories rights of representation in the Dominion Parliament, on a more liberal scale, it was stated, than would result from a strict application of the usual rule of proportion.

In 1871, and in each tenth year from that time, a census of the Dominion has been taken in accordance with sect. 8 of the British North America Act, 1867. And each such census has been followed by an Act of the Dominion Parliament to readjust the representation of the provinces, in conformity with the results disclosed by the census, according to the principles embodied in sect. 51.

Such a census was taken in 1901, and in 1903 followed the Act readjusting representation. That Act, as passed, reduced the number of representatives in the House of Commons of certain of the provinces of the Dominion, of which it is only necessary to mention New Brunswick, whose members were reduced in number from 14 to 13, and Prince Edward Island whose numbers fell from 5 to 4.

Each of these provinces objected to the principles upon which the readjustment had been carried out, and with respect to each of these provinces a question was submitted by Order of the Governor-General-in-Council for the opinion of the Supreme Court.

New Brunswick was one of the four original provinces of the Dominion, and in her case there could be no doubt of the applicability of sect. 51 of the Act of 1867; the only doubt suggested was as to its construction. The question submitted was this:—

"In determining the number of representatives in the House of Commons to which New Brunswick is entitled after each decennial census, should the words "aggregate population of Canada," in sub-sect. 4 of sect. 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada, including that of provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act?"

Prince Edward Island was not one of the four original provinces, but was incorporated in the Dominion in 1873 on terms which have been sufficiently noticed. On her behalf considerations were raised of a somewhat different character from those in the case

of New Brunswick. The question submitted to the Supreme Court in the case of Prince Edward Island was this:—

"Although the population of Prince Edward Island, as ascertained at the census of 1901, if divided by the unit of representation ascertained by dividing the number of 65 into the population of Quebec is not sufficient to give six members in the House of Commons of Canada to that province, is the representation of Prince Edward Island in the House of Commons of Canada liable under the British North America Act, 1867, and amendments thereto, and the terms of Union of 1873 under which that province entered Confederation, to be reduced below six, the number granted to that province by the said terms of Union of 1873?"

The case relating to New Brunswick was the first to come before the Supreme Court, and in that case the learned judges answered the question laid before them to the effect that the words "aggregate population of Canada," in sub-sect. 4 of sect. 51 of the British North America Act, 1867, should be construed as meaning the whole population of Canada, including that of the provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act." And they gave full reasons for their conclusion.

The case of Prince Edward Island afterwards came before the court, and in that case the learned judges, after argument, and for reasons fully stated by them, answered the question submitted to them in the affirmative.

The appeals now before their Lordships are against these two decisions. The appeal of Prince Edward Island was filed first, and the learned counsel for that province was the first to be heard before their Lordships. But it will be more convenient to deal with the cases in the order in which they came before the Supreme Court, and to consider that of New Brunswick first.

The scheme of sect. 51 is clear and simple. In directing a readjustment of representation after each decennial census, it provides that Quebec is to have a fixed number of sixty-five representatives, and that each of the other provinces is to have assigned to it a number of representatives bearing the same proportion as sixty-five bears to that of Quebec. This is the enactment by virtue of which the number of representatives of any province can be increased or diminished, and this is the enactment which furnishes the rule for such a change. Nor is there any dispute that upon the principle so laid down, taken by itself, the reduction in the number of representatives of New Brunswick was right.

The question arises upon sub-sect. 4 which introduces a restriction of qualification upon what has gone before, by saying that by any readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate

population of Canada at the last preceding readjustment is ascertained to be diminished by one-twentieth part or upwards. And the point is as to the meaning of the words "the aggregate population of Canada." By sect. 1 Canada is defined as meaning "unless it is otherwise expressed or implied..... Canada as constituted under this Act." Under the scheme of the Act the Dominion was not constituted by the immediate operation of the Act itself. The territory included in the four original provinces subsequently incorporated, was admitted by Orders-in-Council, issued under sect. 146. In their Lordships' opinion all these provinces equally form part of Canada as constituted under the Act.

The contentions raised on behalf of New Brunswick were these: First, it was said that in sub-sect. 4 of sect. 51 Canada means only the four original provinces. This contention seems to their Lordships inconsistent with sect. 1. It was next said that Canada, sub-sect. 4 of sect. 51, could at most only apply to such provinces as were in the fullest sense themselves governed by that section, and that by reason of the terms of incorporation already cited, this was not the case with regard to each of the three provinces admitted since the original formation of the Dominion. Whatever be the case with regard to the latter part of the contention, it seems clear that the provinces in question form part of Canada as constituted under the Act.

Lastly, it was contended that the territories should be excluded in estimating the aggregate population of Canada under sub-sect. 4. It is doubtful, however, whether this point properly arises on the question submitted to the Supreme Court. It was not suggested that the exclusion of the territories from the calculation could have affected the result of the readjustment, and the Supreme Court has rightly not dealt with this matter.

For these reasons their Lordships agree with the learned judges of the Supreme Court in the case of New Brunswick.

The case put forward on behalf of Prince Edward Island was somewhat wider in its scope. It was suggested that sect. 51 applies only to the distribution of representatives between the four original provinces. But the terms on which Prince Edward Island was incorporated expressly declared that its representation was "to be readjusted from time to time under the provisions of the British North America Act, 1867."

It was further argued that, supposing sect. 51 to apply to Prince Edward Island, still it was not liable to have the number of its representatives reduced in 1903 for the following reasons: That by the terms of sub-sect 4 there could be no reduction on any decennial adjustment to afford a comparison, so that for any province the first readjustment could not entail a reduction, though it might permit of an increase, that there was no readjustment for any province unless its representation was altered,

and that, therefore, by the combined operation of sect. 51 and of the terms on which Prince Edward Island entered the Confederation, its representation could not be reduced unless it had been previously increased.

This argument assumes that there has been no readjustment for any province unless there has been alteration. Their Lordships think this is to give too narrow a meaning to the word. In their opinion, when, as the result of a census, the representation of the provinces is reconsidered and the necessary changes, if any, made to bring it into harmony with the results of the census, that is, a readjustment within the meaning of sub-sect. 4, whether there be or be not any change in the case of any particular province. Their Lordships, therefore, think that the answer of the Supreme Court to the question submitted to it was correct.

"DIRECT TAXATION."

BREWERS' AND MALTSTERS' ASSOCIATION OF ONTARIO v. ATTORNEY-GENERAL FOR ONTARIO.[1]

9. A uniform license fee imposed upon all brewers and distillers within the province is "direct taxation" within the meaning of sect. 92, sub-sect. 2, of the British North America Act, 1867.

LORD HERSCHELL, page 62:—The determination of the appeal depends on what is the true meaning and effect of the 2nd and 9th sub-sections of sect. 92 of the British North America Act. The judgment appealed from can only be supported by establishing either that the fee imposed is "direct taxation" within the meaning of sub-sect. 2, or that the license is comprised within the term "other licenses" in sub-sect. 9. The question, "what is direct taxation" within the meaning of sub-sect. 2, does not come now before this Board for consideration for the first time. In the case of the *Bank of Toronto* v. *Lambe*,[2] it was necessary to put a construction on those words. The Legislature of Quebec had imposed a tax on a bank carrying on business within the province. This tax was a sum varying with the paid-up capital, with an additional sum for each office or place of business. The question at once arose, was this "direct taxation"? It was contended that the tax was not direct, but indirect. All the arguments in favour of the view that the taxation was indirect, which have been forcibly put before your Lordships by the learned counsel for the appellants in the present case, were then pressed upon this Board in vain. The legislation impeach was held valid on the ground that the tax imposed was direct taxation in the

1 Ontario, aff., 6th February, 1897, 76 L. T. R., 61; 66 L. J. R., n.s., 35; 13 T. L. Rep., 197.
2 57 L. T. R., 377; 12 App. Cas., 575.

province within the meaning of sub-sect. 2. Their Lordships are quite unable to discover any substantial distinction between the case of the *Bank of Toronto* v. *Lambe*[1] and the present case.

So far as there is any difference, it does not seem to them to be favourable to this appeal. Their Lordships pointed out that the question was not what was direct or indirect taxation, according to the classification of political economist, but in what sense the words was employed by the Legislature in the British North America Act. At the same time, they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious *indicia* of direct and indirect taxation, which were likely to have been present to the minds of those who passed the Federation Act. The definition referred to is in the following terms: "A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs." In the present case, as in Lambe's case, their Lordships think the tax is demanded from the very person whom the legislature intended or desired should pay it; they do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place, or can have been contemplated as the natural result of the legislation in the case of the tax like the present one, a uniform fee, trifling in amount, imposed alike upon all brewers and distillers, without any relation to the quantity of goods which they sell. It cannot have been intended for the imposition of such a burden to tax the customer or consumer. It is, of course, possible that in individual instances the person, on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax. It was argued that the provincial legislature might, if the judgment of the court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable. But if the legislature were thus, under a guise of direct taxation, to seek to impose indirect taxation nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise. The view which their Lordships have expressed is sufficient to dispose of this appeal. But their Lordships were not satisfied by the argument of the learned counsel for the appellants, that the license which the enactment renders necessary is not a license within the mean-

1 57 L. T. Rep., 377; 12 App. Cas., 575.

ing of sub-sect. 9 of sect. 92. They do not doubt that general words may be restrained to things of the same kind as those particularized, but they are unable to see what is the genus which would include "shop, saloon, tavern, auctioneer" licenses, and which would exclude brewers, and distillers' licenses.

"DOMINION RAILWAYS."

MADDEN v. NELSON AND FORT SHEPPARD RY.[1]

10. A provincial legislature has no power to pass an Act requiring a railway company incorporated within the jurisdiction of the Dominion Parliament to erect or construct any works on their line.

11. The provision in the British Columbia Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway shall be responsible for cattle injured or killed thereon, is *ultra vires* of the provincial parliament.

LORD HALSBURY, page 277:—It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the Provincial Parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn for them and is, therefore, manifestly *ultra vires*. Their Lordships think it unnecessary to do more than to say that in this case the line seems to have been drawn with sufficient precision in the case of the *Canadian Pacific Railway Company v. Parish of Notre-Dame de Bonsecours*,[2] it was decided, that although any direction of the Provincial Legislature to create new works on the railway, and make a new drain, and to alter its construction, would be beyond the jurisdiction of the Provincial Legislature; the railway company were not exempted from the municipal state of the law as it then existed, that all landowners, including the railway company, should clean out the ditches so as to prevent a nuisance. It is necessary to do more here than to say that this case raises no such question anywhere near the line, because in this case there is the actual provision that there shall be a liability on the railway company, unless they create such and such works upon their roadway. That is manifestly and clearly beyond the jurisdiction of the Provincial Legislature.

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1 British Columbia, aff., 19th July, 1899, 81 L. T. R., 276; L. R., 1899, App. Cas., 626; 15 T.'L. Rep., 484.

2 1898, 80 L. T. Rep., 434; 1899, App. Cas., 367.

"EDUCATION."

CITY OF WINNIPEG V. BARRETT, AND THE SAME V. LOGAN.[1]

12. By the Manitoba Act, 1870, sect. 22, sub-sect. 1, the provincial legislature has the exclusive right to make laws with relation to education, provided that "nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the Union."

13. In 1871 a system of denominational education was established by law. By the Public Schools Act, 1890 (53 Vict., ch. 38), this system was swept away and a system of free unsectarian schools was established.

14. It was held that this Act did not violate the provisions in sect. 22, sub-sect. 1, of the Act of 1870, and was not *ultra vires*.

LORD MACNAGHTEN, page 130:—Sub-sections 1, 2 and 3 of sect. 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sub-sections of sect. 93 of the British North America Act, 1867. The only important difference is, that in the Manitoba Act, in sub-sect. 1, the words "by law" are followed by the words "or practice," which do not occur in the corresponding passage in the British North America Act, 1867. These words were, no doubt, introduced to meet the special case of the country which had not as yet enjoyed the security of laws properly so called. It is not, perhaps, very easy to define precisely the meaning of such an expression as "having a right or privilege by practice." But the object of the enactment is tolerably clear. Evidently the word "practice" is not to be construed as equivalent to custom having the force of law. Their Lordships are convinced that it must have been the intention of the legislature to preserve every legal right of privilege and every benefit of the advantage in the nature of a right or privilege, with respect to denominational schools which any class of persons practically enjoyed at the time of the Union.

"IMMIGRATION."

UNION COLLIERY CO., OF BRITISH COLUMBIA V. BRYDEN.[2]

15. The section 4 of the British Columbia "Coal Mines Regulation Act, 1890," which prohibits Chinaman of full age

1 Supr. C., Canada, rev., 30th July, 1892, 67 L. T. R., 329; 61 L. J. R., n s., 58; 8 T. L. Rep., 746.

2 British Columbia, rev., 28th July, 1899, L. R., 1899, App. Cas., 580, 81 L. T. R., 277; 68 L. J. R., n s., 118; 15 T. L. Rep., 568.

from employment in underground coal workings, is, in that respect, *ultra vires* of the provincial legislature.

16. Regarded merely as a coal-working regulation, it would come within sect. 92, sub-sect. 13, of the British North America Act. But its exclusive application to Chinamen who are aliens or naturalized subjects establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament, conferred by sect. 91, sub-sect. 25, in regard to "naturalization and aliens."

LORD WATSON, page 585:—But the question raised directly concerned the legislative authority of the legislature of British Columbia, which depends upon the construction of sects. 91 and 92 of the British North America Act, 1867. These clauses distribute all subjects of legislation between the Parliament of the Dominion and the several legislature of the provinces. In assigning legislative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but when that point has been settled, court of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not. There are various considerations discussed in the judgments of the courts below which in the opinion of their Lordships, have as little relevancy to the question which they had to decide as the evidence upon which these considerations are founded.

There can be no doubt that, if sect. 92 of the Act of 1867 had stood alone, and had not been qualified by the provisions of the clauses which precede it, the provincial legislature of British Columbia would have had ample jurisdiction to enact sect. 4 of the Coal Mines Regulation Act. The subject-matter of that enactment would clearly have been included in sect 92, sub-sect. 10, which extends to provincial undertakings such as the coal mines of the appellant company. It would also have been included in sect. 92, sub-sect. 13, which embraces "Property and Civil Rights in the Province."

But sect. 91, sub-sect 25, extends the exclusive legislative authority of the Parliament of Canada to "naturalization and aliens." Section 91 concludes with a proviso to the effect that "any matter coming within any classes of subjects enumerated in this section shall not be deemed to come within the class of matters of social or private nature comprised in the enumeration of

the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

Section 4 of the Provincial Act prohibits Chinamen, who are of full age, from employment in underground coal workings. Every alien, when naturalized in Canada, becomes, *ipso facto*, a Canadian subject of the Queen; and his children are not aliens requiring to be naturalized, but are natural-born Canadians. It can hardly have been intended to give the Dominion Parliament exclusive right to legislate for the latter class of persons resident in Canada, but sect. 91, sub-sect. 25, might possibly be construed as conferring that power in the case of naturalized aliens after naturalization.

The subject of "naturalization" seems *primâ facie* to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to the Lord-ships to be necessary, in the present case, to consider the precise meaning which the term "naturalization" was intended to bear, as it occurs in sect. 91, sub-sect. 25. But it seems clear that the expression "aliens" occurring in that clause refers to, and at least includes, all aliens who have not yet been naturalized; and the words "no Chinamen," as they are used in sect. 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinamen who has not been naturalized.

"INCORPORATION OF COMPANIES."

HULL ELECTRIC COMPANY v. OTTAWA ELECTRIC COMPANY.[1]

17. Under a by-law of the Hull City Council, afterwards declared valid by the appellants' incorporating Act (Quebec, 58 Vict., ch. 69), the appellants obtained an exclusive right of establishing a system of electric lighting for a certain term of years in the said city, and thereupon sued to revoke a license previously granted by the city, to the respondents for a similar purpose:—

18. It was held that the Quebec Act, passed in favour of a purely local undertaking, was within the exclusive competence of the provincial legislature, and none the less so because it excluded for a limited time the competition of rival traders:—

19. And that by the true construction of the by-law the city did not themselves revoke the license of the respondents under which they were actually supplying electric light to the

1 Quebec, aff., 22nd February, 1901, L. R., 1902, App. Cas., 237

municipality nor give to the appellants the right to have it revoked, and that the respondents were free to carry on their operations until revocation was affected.

CORPORATION OF THE CITY OF TORONTO v. BELL TELEPHONE COMPANY.[1]

20. Under its Dominion Incorporating Act (43 Vict., ch. 67), the respondent telephone company was entitled, without the consent of the municipal corporation, to enter upon the streets and highways of the City of Toronto, and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways.

21. The scope of the respondents' business contemplated by the said Act and involving its extension beyond the limits of any one province was within the express exception made by sect. 92, sub-sect 10, of the British North America Act, 1867, from the class of local works and undertakings assigned thereby to provincial legislatures. Accordingly, Act 43 Vict., ch. 67, was within the exclusive competence of the Dominion Parliament under sect. 91.

22. Ontario Act, 45 Vict., ch. 71, passed to authorize the exercise of the above powers within the province, subject to the consent of the corporation, was held to be *ultra vires*, and could not by reason of having been passed on the application of the respondent company be validated as a legislative bargain.

23. It is not competent to a provincial legislature to impose conditions precedent to the exercise of powers conferred by the Dominion Parliament upon an undertaking which extends beyond the limits of the province, such undertakings being under the exclusive jurisdiction of the Dominion Parliament.

LORD MACNAGHTEN, page 56:—The British North America Act, 1867, in the distribution of legislative powers between the Dominion Parliament and provincial legislatures, expressly excepts from the class of "local works and undertakings" assigned to provincial legislatures, "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province," sect. 92, sub-sect. 10 (a). Section 91 confers on the Parliament of Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company, the objects

1 Ontario, aff., 11th November, 1904, L. R., 1905, App. Cas., 52; 91 L. T. R., 700; 74 L. J. R., n.s., 22; 22 T. L. Rep., 45

of which as defined by its act of incorporation contemplate extension beyond the limits of one province is just as much within the express exception as a telegraph company with like powers of extension.

Page 58:—The view of Street, J., apparently was that, inasmuch as the act of incorporation did not expressly require a connection between the different provinces, the exclusive jurisdiction of the Parliament of Canada over the undertaking did not arise on the passing of the Act, and would not arise unless and until such a connection was actually made. In the meantime, in his opinion, the connection was a mere paper one, and nothing could be done under the Dominion Act without the authority of the legislature of the province. This view, however, did not find favour with any of the learned Judges of Appeal. In the words of Moss, C.J.O., "the question of the legislative jurisdiction must be the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction." If authority be wanted in support of this proposition, it will be found in the case of *Colonial Building and Investment Association* v. *Attorney-General of Quebec*,[1] to which the learned Judges of Appeal refer.

Maclennan, J.A., differed from the rest of the court on one point only. He agreed in thinking that it would not be competent for a provincial legislature of itself to limit or interfere with powers conferred by the Parliament of Canada, but he seems to have thought that the Bell Telephone Company, by reason of its application to the Ontario Legislature, was precluded or estopped from disputing the competency of that legislature, and that the enactment making the consent of the corporation a condition precedent amounted to a legislative bargain between the company and the corporation to the effect that the company would not use the powers conferred upon it by the Dominion Parliament without the consent of the corporation. Their Lordships, however, cannot accept this view. They agree with the Chief Justice in thinking that no trace is to be found of any such bargain, and that nothing has occurred to prevent the company from insisting on the powers which the Dominion Act purports to confer upon it.

"INDIAN RESERVES."

ATTORNEY-GENERAL OF CANADA v. ATTORNEY-GENERAL OF QUEBEC.[2]

24. By treaty between certain Indian tribes and the old Province of Canada, certain lands were surrendered to the

1 1883, 9 App. Cas., 157, p. 165.

2 Supr. Ct., Canada, Ontario, aff., 2nd December, 1896, 75 L. T. R., 522; 66 L. J. R., n.s., 11; 13 T. L. Rep., 103.

province in consideration of a money payment, and a perpetual annuity, and it was provided that in certain events, which happened, the annuity should be increased. By the Dominion Act of 1867, the old Province of Canada was divided into the Provinces of Quebec and Ontario, the lands in question becoming part of the Province of Ontario, and under the provisions of the Act the Dominion of Canada became liable for the original annuity.

25. It was maintained that the lands were not "subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same," within the meaning of sect. 109 of the Act of 1867, and that the Dominion of Canada, and not the Province of Ontario, was liable to pay the additional annuity which had become due.

Ontario Mining Company v. Seybold.[1]

26. Lands in Ontario surrendered by the Indians by the treaty of 1873 belong in full beneficial interest to the Crown as representing the province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof in the advice of the Ministers of the province and under the seal of the province.

27. The Dominion Government having purported, without the consent of the province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty:—

28. Held, that this was *ultra vires* of the Dominion, which had, by sect. 91 of the British North America Act of 1867, exclusive legislative authority over the lands in question, but had no proprietary rights therein.

29. The consent of the province having been subsequently provided for by a statutory agreement between the two governments, the special leave to appeal granted upon the representation of the general public importance of the question involved would probably have been rescinded if a petition to that effect had been made.

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1 Ontario, aff., 12th November, 1902. L. R., 1903, App. Cas., 73; 87 L. T. R., 449; 72 L. J. R., n.s., 5; 19 T. L. Rep., 48.

"INSOLVENCY."

ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY GENERAL FOR CANADA.[1]

30. By the British North America Act, 1867, sect. 91, sub-sect. 21, the exclusive power of legislation with reference to bankruptcy and insolvency is conferred upon the Dominion Parliament.

31. An enactment in the Revised Statutes of Ontario, 1867, ch. 9, postponing judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act was not *ultra vires* of the provincial legislature as it relates to a purely voluntary assignment.

LORD HERSCHELL, page 539:—It is not contested that the enactment, the validity of which is in question, is within the legislative powers conferred on the provincial legislature by sect. 92 of the British North America Act, 1867, which enables that legislature to make laws in relation to property and civil rights in the province, unless it is withdrawn from their legislative competency by the provisions of sect. 91 of that which confers upon the Dominion Parliament the exclusive power of legislation with reference to bankruptcy and insolvency. The point to be determined, therefore, is the meaning of those words in sect. 91 of the British North America Act, 1867, and whether they render the enactment impeached *ultra vires* of the provincial legislature. That enactment in sect. 9 of the Revised Statutes of Ontario of 1888, ch. 124, entitled, "An Act respecting assignments and preferences by insolvent persons." The section is as follows: "An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed, by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands."

In order to understand the effect of this enactment, it is necessary to have recourse to other sections of the Act to see what is meant by the words, "an assignment for the general benefit of creditors under this Act." The first section enacts that if any person in insolvent circumstances, or knowing himself to be on the eve of insolvency, voluntarily confesses judgment or gives a warrant at attorney to confess judgment with intent to defeat or delay his creditors, or to give any creditor a preference over his other creditors, every such confession or warrant of attorney shall be void as against

1 Ontario, rev. [illegible] February, 1894. [illegible] L. T. R., 528; 63 L. J. R., n.s., 59.

the creditors of the party giving it. The second section avoids as against the other creditors any gift or assignment of goods or other property made by a person at a time when he is in insolvent circumstances, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or give any of them a preference. Then follows sect. 3, which is important. Its first sub-section provides that nothing in the preceding section shall apply to an assignment made to the sheriff of a county in which the debtor resides or carries on business, or to any assignee resident within the province with the consent of his creditors, as thereinafter provided for, the purpose of paying rateably and proportionately and without preference or priority all the creditors of all the debtor their just debts. The second sub-section enacts that every assignment for the general benefit of creditors which is not void under sect. 2, but is not made to the sheriff nor to any other person with the prescribed consent of the creditors, shall be void as against a subsequent assignment which is in conformity to provisions of the Act, and shall be subject in other respects to the provisions of the Act, until and unless a subsequent assignment is executed in accordance therewith. The fifth sub-section states the nature of the consent of the creditors, which is requisite for assignment in the first instance to some person other than the sheriff. These are the only sections to which it is necessary to refer in order to explain the meaning of sect. 9. Before discussing the effect of the enactments to which attention has been called it will be convenient to glance at the course of legislation in relation to this and cognate matters, both in the province and in the Dominion. The enactments of sects. 1 and 2 of the Act of 1867 are to be found in substance in sects. 18 and 19 of the Act of the Province of Canada, passed in 1858, for the better prevention of fraud. There is a proviso to the latter section which excepts from its operation any assignment made for the purpose of paying all the creditors of debtors rateably without preference. These provisions were repeated in the Revised Statutes of Ontario, 1877, ch. 118. A slight amendment was made by the Act of 1884, and it was as thus amended that they were re-enacted in 1887. At the time when the statute of 1858 was passed there was no bankruptcy law in force in the Province of Canada.

In the year 1864 an Act respecting insolvency was enacted. It applied in Lower Canada to traders or non-traders. It provided that a debtor should be deemed insolvent, and his estate should become subject to compulsory liquidation, if he committed certain acts similar to those which had for a long period been made acts of bankruptcy in this country. Among these acts were the assignment or the procuring of his property to be seized in execution with intent to defeat or delay his creditors, and also a general assignment of his property for the benefit of his creditors, othewise than in manner provided by the statute. A

person who was unable to meet his engagements might avoid compulsory liquidation by making an assignment of his estate in the manner provided by that Act, but unless he made such an assignment within the time limited the liquidation became compulsory. This Act was in operation at the time when the British North America Act came into force. In 1869 the Dominion Parliament passed an Insolvency Act, which proceeded on much the same lines as the Provincial Act of 1864, but applied to traders only. This Act was repealed by a new Insolvency Act of 1875, which, after being twice amended was, together with the Amending Acts, repealed in 1880.

In 1867 the same year in which the Act under consideration passed, the Provincial Legislature abolished priority amongst creditors by an execution in the High and County Court, and provided for the distribution of any moneys levied on an execution rateably amongst all execution creditors and all other creditors who, within a month, delivered to the sheriff, writs and certificate obtained in the manner provided for by that Act. Their Lordships proceed now to consider the nature of the enactment said to be *ultra vires*. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now, there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are *primâ facie* within the legislature powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered and are subject to regulation by that parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise.

The Act of 1887, which abolished priority as amongst execution creditors, provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year containing the section which is impeached goes a step further and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor, including those which have been seized in execution.

But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency, and, therefore, is a matter exclusively within the jurisdiction of the Dominion Parliament. Now, it is observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system

of bankruptcy or insolvency or any legislation relating thereto. So far from being regarded as an essential part of bankruptcy law, such an assignment was made an act of bankruptcy on which adjudication might be founded and by the law of the Province of Canada which prevailed at the time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.

It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law. Moreover, the operation of an assignment of creditors was precisely the same, whether the assignor was or was not, in fact, insolvent. It was open to any debtor who might deem his insolvency doubtful, and desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the ninth section would equally apply whether the assignor was or was not insolvent. Stress was laid on the fact that the enactments relates only to an assignment under the Act containing the section, and that the Act prescribes that the sheriff of the county to be the assignee, unless a majority of the creditors consent to some other assignee being named. This does not appear to their Lordships to be material. If the enactment would have been *intra vires*, supposing section nine had applied to all assignments without these restrictions, it seems difficult to contend that it became *ultra vires* by reason of them. Moreover, it is to be observed that by sub-sect. 2 of sect. 3, assignments for the benefits of creditors not made to the sheriff or to other persons with the prescribed consent, although they are rendered void as against assignment so made, are nevertheless, unless and until so voided, to be subject in other respects to the provisions of the Act. At the time when the British North America Act was passed, bankruptcy and insolvency legislation existed and was based on very similar provisions both in Great Britain and the Province of Canada.

Attention has already been drawn to the Canadian Act. The English Act then in force was that of 1861. That Act applied to traders and non-traders alike. Prior to that being confined to traders the statutes relating designed to provide for their release from custody on their making an assignment of the whole of their estate for the benefit of their creditors. It is not necessary to refer in detail to the provisions of the Act of 1861. It is enough to say that it provided for a legal adjudication in bankruptcy with the consequence that the bankrupt was divested of all his property and its distribution amongst his creditors was provided for. It is not necessary, in their Lordships' opinion, nor is it expedient to attempt to define what is covered by the words "bankruptcy and insolvency" in sect. 91 of the British North America Act.

But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactment is designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put to their Lordships, the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtors estate. In their Lordships' opinion, these considerations must be borne in mind when interpreting the words, "bankruptcy and insolvency" in the British North America Act. It appears to their Lordships that such provisions, relating as they do to assignments purely voluntary, [illegible] not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various [illegible] provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it is open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects as might properly be treated as ancillary to such a law, and, therefore, within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is bankrupcy or insolvency legislation of the Dominion Parliament in existence.

"JURISDICTION OF FEDERAL PARLIAMENT."

ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR THE DOMINION.[1]

32. The legislation of the Parliament of Canada, in so far as it is within its competency, must override provincial legislation.

33. But the Dominion Parliament has no authority conferred upon it, by the British North America Act, to repeal directly

1 Canada, rev., 9th May, 1896, L. R., 1896, App. Cas., 348.

any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by sect. 92.

LORD WATSON, page 366: -The repeal of a provincial act by the Parliament of Canada can only be affected by repugnancy between its provisions and the enactments of the Dominion: and if the existence of such repugnancy should become a matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be submitted to the judicial tribunals of the country. In their Lordships' opinion the express repeal of the old Provincial Act of 1864 by the Canada Temperance Act of 1886 was not within the authority of the Parliament of Canada. It is true that the Upper Canada Act of 1864 was continued in force within Ontario by sect. 129 of the British North America Act, "until repealed, abolished, or altered by the Parliament of Canada, or by the provincial legislature," according to the authority of that parliament, "or of that legislature." It appears to their Lordships that neither the Parliament of Canada, nor the provincial legislatures have authority to repeal statutes which they could not directly enact. Their Lordships had occasion in *Dobie v. Temporalities Board*,[1] to consider the power of repeal competent to the legislature of a province. In that case the Legislature of Quebec had repealed a statute continued in force after the Union by sect. 129, which has this peculiarity, that its provision applied both to Quebec and to Ontario, and were incapable of being severed so as to make it applicable to one of these provinces only. Their Lordships held[2] that the powers conferred "upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old parliament of the Province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867"; and that it was beyond the authority of the Legislature of Quebec to repeal statutory enactments which affected both Quebec and Ontario. The same principle ought, in the opinion of their Lordships, to be applied to the present case. The old Temperance Act of 1864 was passed for Upper Canada, or, in other words, for the Province of Ontario; and its provisions, being confined to that province only, could not have been directly enacted by the Parliament of Canada. In the present case the Parliament of Canada would have no power to pass a prohibitory law for the Province of Ontario; and could, therefore, have no authority to repeal in express terms an Act which is limited in its operation to that province. In like manner, the express repeal, in the Canada Temperance Act of 1886, of liquor prohibitions adopted by a municipality in the Province of Ontario

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1 7 App. Cas. 136
2 7 App. Cas. 147

under the sanction of provincial legislation, does not appear to their Lordships to be within the authority of the Dominion Parliament.

"KING'S COUNSEL."

ATTORNEY-GENERAL FOR DOMINION OF CANADA v. ATTORNEY-GENERAL FOR PROVINCE OF ONTARIO.[1]

34. According to the true construction of the British North America Act, 1867, sect. 92, sub-sects. 1, 4 and 14, Revised Statutes of Ontario, ch. 139, which empowers the Lieutenant-Governor of the province to confer precedence by patents upon such members of the bar in the province as he may think fit to select is *intra vires* of the provincial legislatures.

LORD WATSON, page 251:—The appointment of counsel for the Crown, and the granting of precedence at the bar to certain of its members, are matters which do not appear to their Lordships to stand upon precisely the same footing. In England the first of these rights has always been a matter of prerogative in this sense, that it has been personally exercised by the Sovereign with the advice of the Lord Chancellor, the appointment being made by letters patent under the sign-manual. In early times the appointment was accompanied with a fee or retainer of moderate amount, but that formality has long since fallen into abeyance. The terms of the patent have been limited to appointing the grantees to be of counsel for the Sovereign, subject to the condition that they are to take precedence *inter se* according to the priority of their appointment. Royal patents of precedence *inter se* were in use to be granted to serjeants-at-law who did not derive their position from the Crown.[2] Beyond these limits the Sovereign has never in modern times professed to confer upon Crown counsel, or other members of the bar, a right of precedence or pre-audience in the Court of England. These are matters which have been regulated in practice either by the discretion of the bench or by the courtesy of the profession. The effect of an appointment as Queen's Counsel is that the holder cannot appear in court as counsel for any part litigating with the Crown unless he has obtained a license from Her Majesty.

The exact position occupied by a Queen's Counsel duly appointed, is a subject which might admit of a good deal of discussion. It is in the nature of an office under the Crown, although

1 Ontario aff., 8th December 1897. L. R. 1898 App. Cas., 247; 77 L. T. R., 539, 67 L. J. R. n.s. 17.
2 See note, 16 C. B. N.S. 1.

any duties which it entails are almost as unsubstantial as its emoluments: and it is also in the nature of an honour or dignity to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred.

"LIQUORS."

ATTORNEY-GENERAL OF MANITOBA v. MANITOBA LICENSE HOLDERS' ASSOCIATION.[1]

35. The Manitoba Liquor Act of 1900 for the suppression of the liquor traffic in that province is within the powers of the provincial legislature, its object being and having been dealt with as a matter of a merely local nature in the province within the meaning of British North America Act, 1867, sect. 92, sub-sect. 16, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly, at least with business operations outside the province.

LORD MACNAGHTEN, page 77:—The question at issue depends on the meaning and effect of these sections in the British North America Act, 1867, which provide for the distribution of legislative powers between the Dominion and the provinces. The subject has been discussed before this Board very frequently and very fully. Mindful of advice often quoted, but not perhaps always followed, their Lordships do not propose to travel the particular case before them.

The drink question, to use a common expression, which is convenient if not altogether accurate, is not to be found specifically mentioned either in the classes of subjects enumerated in sect. 91 and assigned to the Legislature of the Dominion, or in those enumerated in sect. 92 and thereby appropriated to provincial legislatures. The omission was probably not accidental. The result has been somewhat remarkable. On the one hand, according to *Russell v. Reg.*[2] it is competent for the Dominion Legislature [illegible] pression of intemperance applicable to [illegible] of the Dominion, and when duly brought into operation in any particular district deriving its efficacy from the general authority vested in the Dominion Parliament to make laws for the peace, [illegible], and good government of Canada. On the other [illegible] *Attorney-General for Toronto* [illegible] is not incompetent for

[1] [illegible] L. R., 1902, App. Cas., 7[illegible]; [illegible] W. Rep. 431; 18 T. L. Rep., 94 [illegible]
[2] [illegible]

a provincial legislature to pass a measure for the repression, or even for the total abolition, of the liquor traffic within the province, provided the subject is dealt with as a matter "of a merely local nature" in the province, and the Act itself is not repugnant to any Act of the Parliament of Canada.

In delivering the judgment of this Board in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion*,[1] Lord Watson expressed a decided opinion that could not be supported under either No. 8 or No. 9 of sect 92. His Lordship observes that the only enactments of that section which appeared to have any relation to such legislation were to be found in Nos. 13 and 16, which assigned to the exclusive jurisdiction of provincial legislature, (1) "property and civil rights in the province," and (2) "generally all matters of a merely local or private nature in the province." He added that it was not necessary for the purpose of that appeal to determine whether such legislation was authorized by the one or by the other of these heads. Although this particular question was left apparently undecided, a careful perusal of the judgment leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion. In legislating for the suppression of the liquor traffic [illegible] in view is the abatement or prevention of a local evil, [illegible] the regulation of property or civil rights though, of course, such legislation can be carried into effect without interfering more or less with property and civil rights in the province. Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be [illegible] able whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province on the matter.

The controversy, therefore, seems to be narrowed to this [illegible] point: Is the subject of "the liquor tax" a matter "of a merely local nature in the province" of Manitoba, and does the Liquor Act deal with it as such? The judgment of this Board in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion*[1] has relieved the case from [illegible] culties which appear to have [illegible] judges of the Court of King's Bench [illegible] vincial legislature has jurisdiction [illegible] province of intoxicating liquors [illegible] conflict with any legislative provision [illegible] made by the Parliament of Canada [illegible] in the province or any district therein [illegible] might be circumstances in which [illegible]

1 1896, App Cas, 348

have jurisdiction to prohibit the manufacture within the province of intoxicating liquors and the importation of such liquor in the province. For the purposes of the present question it is immaterial to inquire what those circumstances may be. The judgment, [illegible], as it stands, and the report to Her late Majesty consequent thereon, show that in the opinion of this tribunal, matters which are substantially of local or of private interest in a province — matters which are of "a local or private nature from a provincial point of view," to use expressions to be found in the judgment — are not excluded from the category of "matters of a merely local or private nature," because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere [illegible] the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

The Liquor Act proceeds upon a recital that "[illegible] expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor." That is the declared object of the Legislature set out at the commencement of the Act. Towards the end of the Act there occurs this section: "119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Manitoba, except under license, or as otherwise specially provided by this Act, [illegible] restrict the consumption of liquor within the limits of the Province of Manitoba, it shall not affect and is not intended to affect *bona* [illegible] in liquor between a person in the Province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly." Now, that provision is as much part of the Act as any other section in [illegible] Act [illegible] transactions [illegible]

[illegible]

[illegible] *Attorney-General* [illegible] *Dominion* [illegible]

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1 1896 App. Cas. 348

"LORD'S DAY."

ATTORNEY-GENERAL FOR ONTARIO v. HAMILTON STREET RAILWAY.[1]

36. The "Act to prevent the profanation of the Lord's Day" Revised Statutes of Ontario, 1897, ch. 246, treated as a whole, is *ultra vires* of the Ontario Legislature.

37. The criminal law in its widest sense is reserved by sect. 91, sub-sect. 27, of the British North America Act, 1867, for the exclusive authority of the Dominion Parliament; and an infraction of the above Act is an offence against criminal law.

38. It is not the practice of their Lordships to give speculative opinions on hypothecal questions submitted. The question must arise in concrete cases and involve private rights.

LORD CHANCELLOR, page 528:—The question turns upon a very simple consideration. The reservation of the Criminal Law for the Dominion of Canada is given in clear and intelligible terms, which must be construed according to the natural and ordinary signification. Those words seem to their Lordships to require, and, indeed, to admit, no plainer exposition than the language itself affords. Section 91, sub-sect 27, of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada, "the Criminal Law [illegible] constitution of courts of criminal jurisdiction." It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which, in its original form, without the amendment afterwards introduced, was in operation at the time of Confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, "the constitution of courts of criminal jurisdiction," renders it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament.

"NATURALIZATION."

VANCOUVER CITY COLLECTOR AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. TOMEY HOMMA AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.[2]

39. The section 91, subsect. 25, of the British North America Act, 1867, reserves to the exclusive jurisdiction of the

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[1] Ontario 14th July 189[illegible] L. R., 190[illegible] App. Cas., [illegible] 89 L. [illegible] J. R., n.s., 10[illegible] 10 T. [illegible] Rep. 612.

[2] British Columbia [illegible] v. Supr. C. Canada [illegible] December [illegible] 1903 App. Cas. 151 [illegible] L. T. R. [illegible] Rep. [illegible]

Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted.

40. The provincial legislature has the right to determine under sect. 92, sub-sect. 1, what privileges, as distinguished from necessary consequences, shall be attached to it.

41. Accordingly, the British Columbia Provincial Elections Act, 1897, ch. 67, sect. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not *ultra vires*.

LORD CHANCELLOR, page 155:—A child of Japanese parentage, born in Vancouver City, is a natural-born subject of the King, and would be equally excluded from the possession of the franchise. The extent to which naturalization will confer privileges is varied both in this country and elsewhere. From the time of William III. down to Queen Victoria, no naturalization was permitted which did not exclude the alien naturalized from sitting in Parliament or in the Privy Council.

In Lawrences' Wheaton, page 903 (2nd annotated ed., 1863), it is said that "though (in the United States) the power of naturalization be nominally exclusive in the Federal Government, its operation in the most important particulars, especially to the right of suffrage, is made to depend on the local constitution and laws." The term "political rights," used in the Canadian Naturalization Act, is, as Walker, J., very justly says, a very wide phrase, and their Lordships concur in his observation that, whatever it means, it cannot be held to give necessarily a right to the suffrage in all or any of the provinces. In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign.

Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law *ultra vires* such a construction of sect. 91, sub-sect. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the

privileges attached to it, where these depend upon residence, are quite independent of nationality.

This, indeed, seems to have been the opinion of the learned judges below: but they are precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery* v. *Bryden*. That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulations of coal mines at all, but were, in truth, devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia, and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.

"PREROGATIVES OF THE CROWN." *See* CROWN: *Prerogatives.*

"PRIVILEGES OF MEMBERS."

FIELDING ET AL. v. THOMAS.[2]

42. The British North America Act gives power to pass Acts for defining the powers and privileges of the Provincial Legislature.

43. A section of a Provincial Act giving to the members of the Provincial Legislature "the privileges, immunities, and powers for the time being, held, enjoyed and exercised" by the members of the Dominion Parliament, is not *ultra vires*, and affords a good defence to an action against members of the Legislature for assault and false imprisonment by reason of their having voted, as such members, for the imprisonment of the respondent for contempt of the House, the Dominion Parliament having previously conferred upon itself the privilegee immunities, and powers of the House of Commons of the United Kingdom.

LORD HALSBURY, L.C., page 219:—The contempt complained of was a wilful disobedience to a lawful order of the House to attend. The authorities summed up in *Burnett* v. *Abbot*,[3] and followed in the case of *The Sheriff of Middlesex*,[4] establish beyond

1 51 L. T. R., 277

[illegible] July, 1896 5 L. T. R. 216 65 L. J. R. [illegible] 102

3 14 [illegible] 1

4 11 [illegible]

all possibility of controversy the right of the House of Commons of the United Kingdom to protect itself against insult and violence by its own process without appealing to the ordinary courts of law, and without having its process interfered with by those courts. The correspondent, however, argues, that the Act of the Provincial Legislature, which undoubtedly creates the jurisdiction, and further indemnified members of it against any proceeding for their conduct or acts in the House by the ordinary courts of law, is *ultra vires*. According to the decisions which have been given by this Board there is no doubt that the Provincial Legislature could not confer on itself the privileges of the House of Commons of the United Kingdom, or the powers to punish the breach of those privileges by imprisonment or committal for contempt without express authority from the Imperial Legislature. By sect. 2, which was substituted for sect. 3, it was enacted that the privileges, immunities, and powers to be held, enjoyed and exercised by the Dominion House of Commons should be such as should be from time to time defined by the Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, or power exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of the Parliament of the United Kingdom and by the members thereof. There is no similar enactment in the British North America Act, 1867, relating to the House of Assembly of Nova Scotia, and it was argued, therefore, that it was not the intention of the Imperial Parliament to confer such a power on that Legislature. But it is not to be observed that the House of Commons of Canada was a legislative body created for the first time by the British North America Act, and it may have been thought expedient to make express provision for the privileges, immunities and powers of the body so created, which was not necessary in the case of the existing Legislature of Nova Scotia. By sect. 88 the constitution of the Legislature of the Province of Nova Scotia was, subject to the provisions of the Act, to continue as it existed at the Union until altered by the authority of the Act. It was, therefore, an existing legislature subject only to the provisions of the Act. By sect. 4 it had at that time full power to make laws respecting its constitution, powers and procedure. It is difficult to see how this power was taken away from it, and the power seems sufficient for the purpose. Their Lordships are, however, of opinion that the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the Provincial Legislature. By sect. 92 of that Act the provincial legislatures may exclusively make laws in relation to matters coming within the classes of subjects enumerated, *inter alia* the amendment from time to time of the constitution of the province, with but one exception, namely, as regards the office of Lieutenant-Governor. It surely

cannot be contended that the independence of the Provincial Legislature from outside interference, its protection and the protection of its members from insult while in the discharge of their duties, are not matters which may be classed as part of the constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitution and law of the province.

It is further argued that the order which the respondent disobeyed was not a lawful order, or one which he was under any obligation to obey. The argument seems to be that the original cause of complaint was a libel; that though the particular breach of the Act complained of was the disobedience to the orders of the House, yet, as those orders were issued in reference to a certain petition present to the House, the contents of which were alleged to be libellous, and during the investigation of the question who was responsible for its representation, and as it must be assumed that a libel is a matter beyond the jurisdiction of the House to inquire into, inasmuch as libel is a criminal offence, and the criminal law is one of the matters reserved for the exclusive jurisdiction of the Dominion Parliament, the whole matter was *ultra vires*: and both the members who voted and the officers who carried out the orders of the House are responsible to an ordinary action at law. Their Lordships are unable to acquiesce in any such contention. It is true the criminal law is one of the subjects reserved by the British North America Act for the Dominion Parliament, but that does not prevent an inquiry into and the punishment of an interference upon the provincial legislatures by insult or violence. The legislature has none the less a right to prevent and punish obstruction to the business of legislation because the interference involves the commission of a criminal offence, or brings the offender within the reach of the criminal law. Neither in the House of Commons of the United Kingdom nor the Nova Scotia Assembly could a breach of the privileges of either body be regarded as subjects ordinarily included within that department of State Government which is known as the criminal law. The efforts to drag such questions before the ordinary courts when assaults or libels have been in question in the British Houses of Legislature have been invariably unsuccessful, and it may be observed that 1 Will & M., sects. 2, ch. 2, sect. 1, sub-sect. 9, "That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament," is declaratory and not enacting. Their Lordships are, therefore, of opinion that the 20th section of the Provincial Act is not *ultra vires*, and affects a defence to the action.

It may be that sects. 30 and 31 of the Provincial Act are not *ultra vires*, if construed literally, and apart from their context would be *ultra vires*. Their Lordships are disposed

to think that the House of Assembly could not constitute itself a court of record for the trial of criminal offences. But read in the light of other sections of the Act, and having regard to the subject-matter with which the legislature was dealing, their Lordships think that those sections were merely intended to give to the House the powers of a court of record for the purpose of dealing with breaches of privileges and contempt by way of committal. If they mean more than this, or if it be taken as a power to try or punish criminal offences otherwise than as incident to the protection of members of proceeding, sect. 30 could not be supported. It is to be observed that the case of *Burton*,[1] referred to by one of the learned judges below, is no authority in favour of the contention here. No statute was there relied upon, but the Legislative Assembly itself in that case had, in pursuance of statutory powers, adopted certain Standing Rules or Orders for the orderly conduct of the business of the Assembly. The trespasses complained of were adjudged by this Board not to be justifiable under the Standing Orders. It was then sought to justify the acts in question as being within a power incident to or inherent in Colonial Legislative Assembly. This Board refused to adopt that contention, but their Lordships expressly added: "They think it proper to add that they cannot agree with the opinion which seems to have been expressed by the court below, that the powers conferred upon the Legislative Assembly by the Constitution Act do not enable the Assembly to adopt from the Imperial Parliament, or to pass by its own authority, any Standing Order giving itself the powers to punish an obstructing member, or remove him from the chamber, for any longer period than the sitting during which the obstruction occurred.'"

This, of course, could not be done by the Assembly alone without the assent of the Governor. But their Lordships are of opinion that it might be done with the Governor's assent; and that the express powers given by the Constitution Act are not limited by the principles of common law applicable to those inherent powers, which must be implied, (without express grant,) from mere necessity, according to the maxim, *Quando lex aliquid concedit concedure videtur et illud sine quores ipsa esse non potest.* Their Lordships' affirmance of the judgment appealed from is founded on the view, not that this could not have been done, but that it was not done, and that nothing appears on the record which can give the resolution suspending the respondent a larger operation than that which the court below has ascribed to it. But independently of these considerations the provisions of sect. 26 of the Act of the Provincial Legislature would, in their Lordships' opinion, form a complete answer to the action, even if the act complained of had been in itself actionable. Their Lordships are here dealing with a civil action, and they think it sufficient to

1 55 L. T Rep., 153; 11 App. Cas., 197

say that the Legislature could relieve members of the House from civil liability for acts done and words spoken in the House, whether they could or could not do so from liability to a criminal prosecution. No such question as that which arose in *Barton* v. *Taylor*[1] arises here. All these matters: the express enactment of the privileges of the House of Commons of the United Kingdom—the express power to deal with such acts by the Provincial Assembly—the express indemnity against any action at law for things done in the Provincial Parliament are all explicitly given, and the only arguable question is that which their Lordships have dealt with, namely, whether it was within the power of the Provincial Legislature to make such laws.

"PUBLIC LANDS."

ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. CANADIAN PACIFIC RAILWAY.[2]

44. The section 108 of the British North America Act, 1867, empowers the Dominion Parliament to legislate for any land, including foreshore which is proved to form part of a public harbour. Sections 91 and 92, read together, empower the Dominion to dispose of provincial Crown lands, and, therefore, of a provincial foreshore, for the purposes of the respondent railway, which is a transcontinental railway connecting several provinces:—

45. The Privy Council held that sect. 18 (*a*) of the respondents' incorporating Dominion Act (44 Vict., ch. 1) is not controlled by the Consolidated, 1879, and applies to provincial as well as Dominion Crown Lands. Power given thereunder to appropriate the foreshore in question includes a power to obstruct any rights of passage previously existing across it.

SIR ARTHUR WILSON, page 209:—The right of the Dominion Parliament to legislate with respect to provincial Crown lands, situated, as these are, was based in argument upon two distinct grounds.

The first ground was this: Section 108, with the Third Schedule of the British North America Act, 1867 (Imperial Act, 30 and 31 Vict., ch. 3), includes public harbours amongst the property in each province which is to be the property of Canada. This certainly empowers the Dominion Parliament to legislate for any land which forms part of a public harbour

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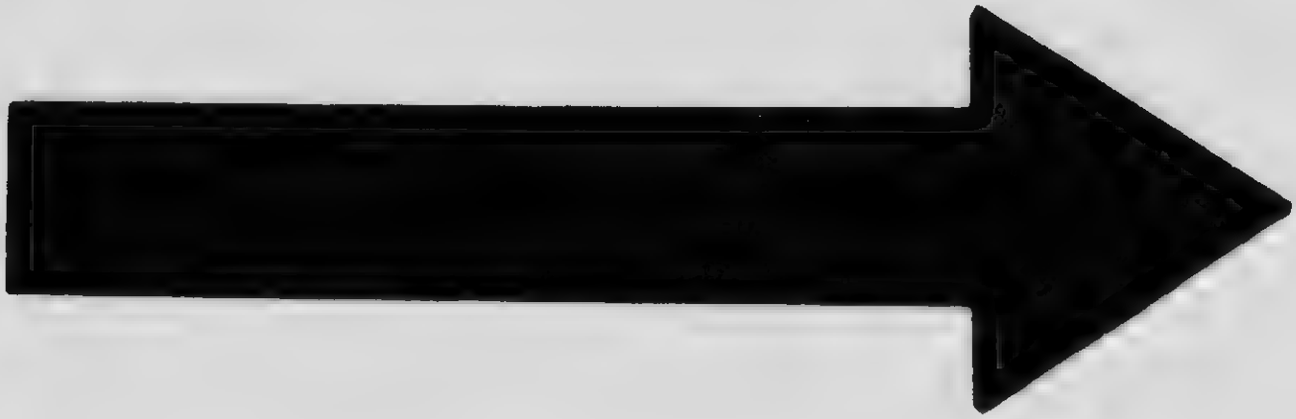
1 55 L. T. R., 158

2 British Columbia, aff. 27th February, 1906. L. R., 1906, App. Cas., 204; 94 L. T. R., 295; 222 T. L. Rep., 336; 75 L. J., P. C., n.s., 38



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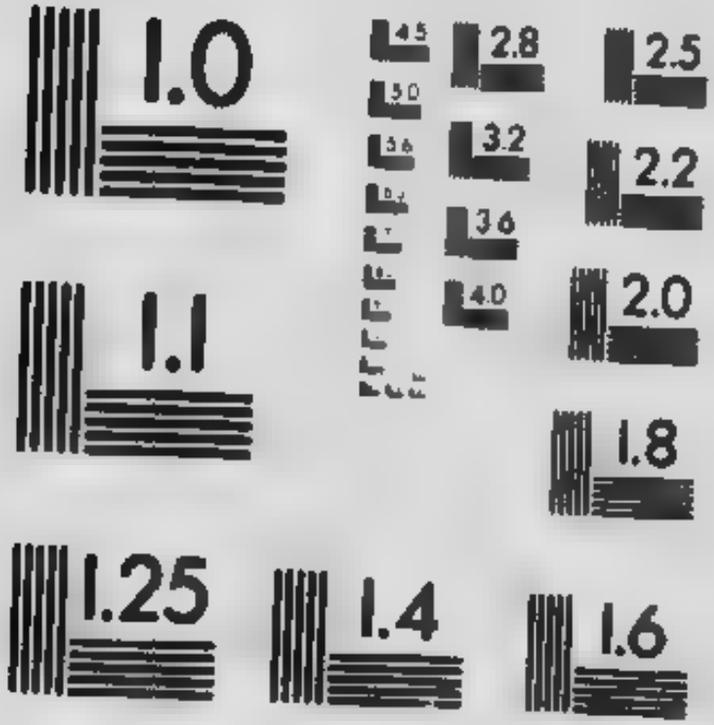

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In a case heard by this Board, *Attorney-General for the Dominion of Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia*,[1] it was laid down that—

"It does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may, or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it is equally clear that it did not form part of it.

Page 210:—The second contention in support of the right of the Dominion Parliament to legislate for the foreshore in question is rested upon sect. 91, read with sect. 92, of the British North America Act, which secures to the Dominion Parliament exclusive legislative authority in respect of lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting any province with any other, or others of the provinces, or extending beyond the limits of the province, a description which clearly applies to the Canadian Pacific Railway.

It was argued for the appellant that these enactments ought not to be so construed as to enable the Dominion Parliament to dispose of the Provincial Crown Lands for the purposes mentioned. But their Lordships cannot concur in that argument. In *Canadian Pacific Railway Co.* v. *Corporation of the Parish of Notre-Dame de Bonsecours*[2] (a case relating to the same company as the present), the right to legislate for the railway in all the provinces through which it passes was fully recognized. In *Toronto Corporation* v. *Bell Telephone Co., of Canada*,[3] which related to a telephone company whose operations were not limited to one province, and which depended on the same sections, this Board gave full effect to legislation of the Dominion Parliament over the streets of Toronto which are vested in the city corporation. To construe the sections now in such a manner as to exclude the power of Parliament over Provincial Crown Lands, would, in their Lordships' opinion, be inconsistent with the terms of the sections which they have to construe with the whole scope and purpose of the legislation and with the principle acted upon in the previous decisions of this Board. Their Lordships think, therefore, that the Dominion Parliament had full power, if it thought fit, to authorize the use of Provincial Crown Lands by the company for the purposes of this railway.

It was contended, however, for the appellant that, assuming the competence of the Dominion Parliament to legislate with

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1 1898, App. Cas., 700, 712.
2 1899, App. Cas., 367.
3 1905, App. Cas., 52.

respect to Provincial Crown Lands such as those now in question, it has not, in fact, done so, for it was said that sect. 18 (a) of the Canadian Pacific Railway Act, when it authorized the company to take the foreshore of the sea "in so far as the same shall be vested in the Crown," should be construed as limited to Dominion Crown property. The argument was rested mainly upon the words in the same section, "in so far as the same shall not be required by the Crown," and upon the words at the end of the section requiring the deposit of a map or plan in the office of the Minister of Railways

It was argued that no protection is here provided for provincial interest, and that, therefore, the section should not be held to apply to provincial lands. But with regard to the exception of lands required by the Crown, their Lordships think that they apply to provincial requirements no less than to those of the Dominion. The final words of the section are mere matters of procedure, and in prescribing the procedure the legislature must be taken to have assumed that all necessary communications between the Dominion Government and the Provincial Governments would always take place. This argument, therefore, fails, in their Lordships' opinion.

"PUBLIC SCHOOLS."

BROPHY V. ATTORNEY-GENERAL OF MANITOBA.[1]

46. Where the Roman Catholic minority of Manitoba appealed to the Governor-General-in-Council against the Manitoba Education Acts of 1890, on the ground that their rights and privileges in relation to education had been affected thereby:—Such appeal lay under sect. 22, sub-sect. 2, of the Manitoba Act, 1870, which applies to rights and privileges acquired by legislation in the province after the date thereof.

47. The Roman Catholics having acquired by such legislation the right to control and manage their denominational schools, to have them maintained out of the general taxation of the province, to select books for their use, and to determine the character of the religious teaching therein, were affected as regards that right by the Acts of 1890, under which State aid was withdrawn from their schools, while they themselves remained liable to local assessment in support of non-sectarian schools to which they conscientiously objected.

48. The Governor-General-in-Council has power to make remedial orders in the premises within the scope of sub-sect. 3

1 Supr. C., Canada, rev., 29th January, 1895, L. R., 1895, App. Cas., 202; 72 L. T. R., 163; 64 L. J. R., n.s., 70.

of sect. 22—*e.g.*, by supplemental rather than repealing legislation.

"RAILWAYS."

CANADIAN PACIFIC RAILWAY v. CORPORATION OF NOTRE-DAME DE BONSECOURS.[1]

49. By the true construction of the British North America Act, 1867, sect. 91, sub-sect. 29, and sect. 92, sub-sect. 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the appellant railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorized works:—

50. The provisions of the municipal code of Quebec, which prescribe the cleaning of the ditch and the removal of an obstruction which had caused inundation on neighbouring land, are *intra vires* of the provincial legislature.

LORD WATSON, page 372:—The British North America Act, whilst it gives the legislative control of the appellants' railway *quâ* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and its management, and to dictate the constitution of the powers of the company; but it is *inter alia*, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so-called, applicable to those lines which were placed under its charge, should belong to the Dominion Parliament. It, therefore, appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion be a piece of municipal legislation competent to the Legislature of Quebec.

1 Quebec, aff., 24th March, 1899, L. R., 1899, App. Cas., 367; 80 L. T. R., 434; 68 L. J. R., n.s., 54.

"RIVERS, HARBOURS, FISHERIES."

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR THE PROVINCES OF QUEBEC, ONTARIO AND NOVA SCOTIA.[1]

51. Whatever proprietary rights vested in the provinces at the date of the British North America Act, 1867, remains so, unless by its express enactments transferred to the Dominion. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject-matter of those proprietary rights.

52. The transfer by sect. 108 and the 5th clause of the schedule to the Dominion of "rivers and lake improvements" operates on its true construction in regard to the improvements only, both of rivers and lakes, and not in regard to the entire rivers. Such construction does no violence to the language employed, and is reasonable and probable in accordance with the intention of the legislature:—

53. The Transfer of "public harbours" operates on whatever is properly comprised in that term, having regard to the circumstances of each case, and is not limited merely to those portions on which public works had been executed.

54. Section 91 did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enables it to affect those rights to an unlimited extent, [illegible] of transferring them to others.

55. A tax, by way of license, as a condition of the right to fish is within the powers conferred by sub-sects. 4 and 12.

56. The same power is conferred on the Provincial Parliament by sect. 92.

57. Revised Statutes of Canada, ch. 95, sect. 4, so far as it empowers the grant of exclusive fishing rights over provincial property is *ultra vires* the Dominion.

58. Revised Statutes of Quebec, ch. 24, sect. 47, is with a specific exception *intra vires* the province.

59. As regards Ontario Act, 1892, the regulations therein which control the manner of fishing are *ultra vires*. Fishing regulations and restrictions are within the exclusive competence

1 Supr. C., Canada, 26th May, 1897, L. R., 1898, App. Cas., 700; 78 L. T. R., 697; 67 L. J. R., n.s., 90.

of the Dominion, see sect. 91, sub-sect. 12. *Secus* with regard to any provisions relating thereto which would properly fall under the headings "Property and Civil Rights," or "The Management and Sale of Public Lands":—

60. The Dominion Legislature had power to pass Revised Statutes of Canada, ch. 92, intituled, "An Act respecting certain Works constructed in or over Navigable Waters."

LORD HERSCHELL, page 709:—It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown, or what the public rights exist in respect of them. Whether a lake or river be vested in the Crown as represented by the Dominion, or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they may be modified by legislation, are precisely the same. The answer, therefore, to such questions as those adverted to would not assist in determining whether in any particular case the property is vested in the Dominion or in the province. It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdi n. The fact that such jurisdiction in respect of a particular su ct-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them, except such as are by any of its express enactments transferred to the Dominion of Canada.

Page 711:—With regard to public harbours, their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the 3rd schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term "harbour" on which public works had been executed, became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court, in arriving at the same conclusion, founded their opinion on a previous decision in the same court. In the case of *Holman* v. *Green*,[1] where it was held that the foreshore between high and low watermark on the margin of the harbour became the property of the Dominion as part of the harbour.

Their Lordships think extremely inconvenient that a determination should be sought of the abstract question, what falls within

1 Supr. Court Rep., 707.

the description "public harbour." They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green*[1] that if more than the public works connected with the harbour passed under that word, and if it concluded any part of the bed of the sea, it followed that foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion.

Their Lordships are of opinion that it does not follow that because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships, or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it.

"SETTLERS' LAND."

McGregor v. Esquimault and Nanaimo Ry. Co.[2]

61. The British Columbia Vancouver Settlers' Rights Act, 1904, directed that a grant in fee simple, without any reservations as to mines and minerals, should be issued to settlers therein defined, and thereunder a grant was made to the appellant of the lots in suit.

62. By an Act of the same Legislature in 1883, land which included the said lot had been granted with its mine and minerals to the Dominion Government in aid of the construction of the respondents' railway, and in 1887 had been by it granted to the respondents under the provisions of a Dominion Act passed in 1874:—

63. Held, that the Act of 1904, on its true construction, legalized the grant thereunder to the appellant, and superseded the respondents' title.

64. Held, also, that the Act of 1904 was *intra vires* of the local legislature. It has the exclusive power of amending or repealing its own Act of 1883. The Act, moreover, related

1 16 Supr. C. Rep., 707.
2 British Columbia, 1907, rev., L. R., 1907, App. Cas., 463; 76 L. J., n.s., 85.

to land which had become the property of the respondents, and affected a work and undertaking purely local within the meaning of sect. 92, sub-sect. 10, of the British North America Act.

SIR HENRY ELZEAR TASCHEREAU, page 468:—On the constitutionality of the Act of 1904 and the power of the British Columbia Legislature to enact it, their Lordships see no reason for doubt. The legislature had the exclusive right to amend or repeal in whole or in part, its own said statute of December, 1883 (47 Vict., ch. 14). And the Act relates, not to public property of the Dominion, as contended for by the respondents, but to property and civil rights in the province, and affects a work and undertaking purely local (sect. 92, sub-sect. 10, of the British North America Act). This railway is the property of the respondents, and the said land had ceased to be the property of the Dominion in 1887 by the grant thereof to the respondents. By an Act passed in 1905 by the Dominion Parliament the legislative power over the company has since been transferred to the Federal authority, but that Act, of course, has no application to this case.

"SWAMP LANDS."

ATTORNEY-GENERAL FOR MANITOBA V. ATTORNEY-GENERAL FOR CANADA.[1]

65. The Canadian Act, 48 and 49 Vict., ch. 50, sect. 1, which was re-enacted as sect. 4 of the Revised Statutes of Canada, ch. 47, provides that certain Crown Lands in the Province of Manitoba "shall be transferred to the province, and enure wholly to its benefit and uses."

66. Under these statutes the province was entitled to the profits of the lands transferred only from the date of the actual transfer, and not from the date of the statute.

"TEMPERANCE."

ATTORNEY-GENERAL FOR ONTARIO V. ATTORNEY-GENERAL FOR THE DOMINION.[2]

67. The general power of legislation conferred upon the Dominion Parliament by sect. 91 of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are

1 Supr. C., Canada, Exchequer Court, aff., 5th August, 1904, 91 L. T. R., 300; 20 T. L. Rep., 769

2 Canada, rev., 9th May, 1896. L. R. 1896 App. Cas., 348; 74 L. T. R., 533; 65 L. J. R., n. s., 26

unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in sect. 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion.

68. Dominion enactments, when competent, override, but cannot directly repeal provincial legislation. Whether they in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislature.

69. Accordingly, the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 and 28 Vict., ch. 18), was *ultra vires* the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order, and good government of Canada.

70. The liquor prohibitions authorized by the Ontario Act (53 Vict., ch. 56, sect. 18), are within the powers of the provincial legislature. But they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886.

LORD WATSON, page 359:—The authority of the Dominion Parliament to make laws for the suppression of liquor traffic in the provinces is maintained, in the first place, upon the ground that such legislation deals with matters affecting "the peace, order, and good government of Canada," within the meaning of the introductory and general enactments of sect. 91 of the British North America Act; and, in the second place, upon the ground that it concerns "the regulation of trade and commerce," being No. 2 of the enumerated classes of subjects which are placed under the exclusive jurisdiction of the Federal Parliament by that section. These sources of jurisdiction are in themselves distinct, and are to be found in different enactments.

It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by sect. 91 might occasionally and incidentally involve legislation upon matters which are *primâ facie* committed exclusively to the provincial legislatures by sect. 92. In order to provide against that contingency, the concluding part of sect. 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of

the provinces." It was observed by this Board in *Citizens' Insurance Co. of Canada* v. *Parsons*,[1] that the paragraph just quoted "applies in its grammatical construction only to No. 16, of sect. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in sect. 91 was meant to include and correctly to describe all the matters enumerated in the sixteen heads of sect. 92, as being, from a provincial point of view, of a local or private nature. It also appears to the Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens' Insurance Co. of Canada* v. *Parsons*,[2] and in *Cushing* v. *Dupuy*[3]; and it has been recognized by this Board in *Tennant* v. *Union Bank of Canada*,[4] and in *Attorney-General of Ontario* v. *Attorney-General for the Dominion*.[5]

The general authority given to the Canadian Parliament by the introductory enactments of sect. 91 is "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces"; and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of the subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from sect. 92, which is enacted by the words of sect. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach on any class of subjects which is exclusively assigned to provincial legislatures by sect. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in sect. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and

1 7 App. Cas., 108.
2 7 App. Cas., 108, 109.
3 5 App. Cas., 409, 415.
4 1894, App. Cas., 31, 46.
5 1894, App. Cas., 189, 200.

ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in sect. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by sect. 91, would, in their Lordships' opinion, not only be contrary to the amendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in sect. 92 upon which it might not legislate, to the exclusion of the provincial legislature. In construing the introductory enactments of sect. 91 with respect to matters other than those enumerated, which concern the peace, order, and good government of Canada, it must be kept in view that sect. 94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, does not extend to the Province of Quebec; and also that the Dominion legislation thereby authorized is expressly declared to be of no effect unless and until it has been adopted and enacted by the provincial legislature. These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the instructory provisions of sect. 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole. Their Lordships do not doubt that some matters in their origin, local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulations or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and, therefore, within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offense, or their sale to young persons, within the province, would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion.

The judgment of this Board in *Russell* v. *Reg.*[1] has relieved their Lordships from the difficult duty of considering whether the

1 7 App. Cas., 829.

Canada Temperance Act of 1886 relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within the competency of Canadian Parliament. In that case the controversy related to the validity of the Canada Temperance Act of 1878; and neither the Dominion nor the provinces were represented in the argument. It arose between a private prosecutor and a person who had been convicted, at his instance, of violating the provisions of the Canadian Act within a district of New Brunswick, in which the prohibitory clauses of the Act of 1878 were in all material respects the same with those which are now embodied in the Canada Temperance Act of 1886; and the reasons which are assigned for sustaining the validity of the earlier, are, in their Lordships' opinion, equally applicable to the later Act. It therefore appears to them that the decision in *Russell* v. *Reg.*,[1] must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order and good government of Canada.

That point being settled by decision, it becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886 as being an Act for the "Regulation of trade and commerce" within the meaning of No. 2 of sect. 91. If it were so, the Parliament of Canada would, under exception from sect. 92, which has been already noticed, be at liberty to exercise its legislative authority, although in doing so it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of sect. 91 were discussed by this Board at some length in *Citizens' Insurance Co.* v. *Parsons*,[2] where it was decided that in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their Lordships do not find it necessary to reopen that discussion in the present case. The object of the Canada Temperance Act of 1886 is not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view their Lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which

1 7 App. Cas., 829
2 7 App. Cas., 96

was recently expressed on their behalf by Lord Davey, in *Municipal Corporation of the City of Toronto* v. *Virgo*,[1] in these terms: "Their Lordships think there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and, indeed, a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

The authority of the Legislature of Ontario to enact sects. 18 to 53 Vict., ch. 56, was asserted by the appellant on various grounds. The first of these, which was very strongly insisted on, was to the effect that the power given to each province by No. 8 of sect. 92, to create municipal institutions in the province, necessarily implies the right to endow these institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the time of the Union. Their Lordships can find nothing to support that contention in the language of sect. 92, No. 8, which, according to its natural meaning, simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until confederation, the legislature of each province as then constituted, could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date a provincial legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of sect. 92 other than No. 8.

Their Lordships are likewise of opinion that sect. 92, No. 9, does not give provincial legislatures any right to make laws for the abolition of the liquor traffic. It assigns to them "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes." It was held by this Board in *Hodge* v. *Reg.*[2] to include the rights to impose reasonable conditions upon the licenses which are in the nature of regulations; but it cannot, with any show of reason, be construed as authorizing the abolition of the sources from which revenue is to be raised.

The only enactments of sect. 92 which appear to their Lordships to have any relation to the authority of provincial legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exclusive jurisdiction, (2) "property and civil rights in the province," and (3) "generally all matters of a merely local or private nature in the province." A law which prohibits retail transactions and restricts the consumption of liquor within the limit of the province, and does not affect transactions in liquor between persons

1 1896, App. Cas., 88.
2 9 App. Cas., 117.

in other provinces or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the province. It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and, therefore, falling *primâ facie* within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province where the prohibition was urgently needed.

It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local, within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In sect. 92, No. 16, appears to them to have the same effect which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfilled in sect. 91. It assigns to the provincial legislature all matters in a provincial sense local or private, which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include provincial legislation in relation to the classes of subjects already enumerated.

In the able and elaborate argument addressed to their Lordships on behalf of the respondents, it was practically conceded that a provincial legislature must have power to deal with the restrictions of the local traffic of a local and provincial point of view, unless it be held that the whole subject of restriction or abolition is exclusively committed to the Parliament of Canada as being within the regulation of trade and commerce. In that case the subject, in so far, at least, as it had been regulated by Canadian legislation, would, by virtue of the concluding enactment of sect. 91, be excepted from the matters committed to provincial legislatures by sect. 92. Upon the assumption that sect. 91 (2) does not embrace the right to suppress a trade, Mr. Blake maintained that, whilst the restrictions of the liquor traffic may be competently made a matter of legislation in a provincial as well as a Canadian aspect, yet the Parliament of Canada has, by enacting the Temperance Act of 1886, occupied the whole possible field of legislation in either aspect, so as completely to exclude legislation by a province. That appears to their Lordships to be the real point of controversy raised by the question with which they are at present dealing, and, before discussing the point, it may be expedient to consider

the relation in which the Dominion and provincial legislation stand to each other.

It has been frequently recognized by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation. But the Dominion Parliament has no authority conferred upon it by the act to repeal directly any provincial statute, whether it does or does not come within the limit of jurisdiction prescribed by sect. 92.

See DAMAGES: *Powers given by Legislature*; STATUTES: *Construction, "Different Legislation" "Rights given by Legislature;"* WAREHOUSE RECEIPT: *Negotiability.*

LEGISLATION.

RETROACTIVITY OF LAW.

THE COLONIAL SUGAR REFINING COMPANY v. IRVING.[1]

1. A statute which abolishes an appeal to the Privy Council from the court of a state exercising federal jurisdiction, is not retrospective in its operation so as to take away the right of appeal in an action commenced before the Act came into operation, the right of appeal not being a mere matter of procedure.

LORD MACNAGHTEN, page 514:—As regards the general principles applicable to the case, there was no controversy. On the one hand, if it be more than a matter of procedure, if it touch a right in existence at the passing of the Act, it was conceded that in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act was not retrospective by express enactment or necessary intendment. And, therefore, the only question was: Was the appeal to His Majesty-in-Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seemed to their Lordships that the question did not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right was a very different thing from regulating procedure. In principle their Lordships saw no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there was an interference with existing rights contrary to the well-known general principle

1 Queensland, aff., 17th May, 1905, 21 T. L. Rep., 513

that statutes were not to be held to act retrospectively unless a clear intention to that effect was manifested.

ROSS v. BEAUDRY ET AL.[1]

2. The principle that legislation is presumed not to be retroactive cannot, in the case of an alteration in the general law, be extended to all the consequences of the original enactment.

3. Thus it does not operate to preserve the privileges of the grantor of a lease in respect of the judicial abandonment of property by a trader where those privileges have been curtailed by legislation subsequent to the date of the lease.

LORD ROBERTSON, page 108:—Accordingly, *primâ facie*, the true application of the doctrine against the retroaction of laws is to confine this particular enactment to liquidations arising after the amendment of the law. The question whether there shall be a further limitation of the enactment by excluding lessors whose leases are dated prior to the amending Acts stands in a very different position, and the intention of the legislature must be derived, as in any case, from the language and the subject-matter of the enactment. Now, it is to be observed that the right now insisted upon by the landlord was derived, not from the terms of the lease, but from the general law as expressed in the Code. In the earlier form of article 2005 (as it stood at the date of the leases) there was one regulation to the effect of the abandonment by a trader on the relative position of creditors; in the new form of the article there is a different one. Now, it is extremely difficult to suppose that it was intended that what is expressed as a uniform rule for liquidation should be invaded by the varying exceptions which would result from the respondent's arguments without express authority by the legislature. All regulations about the ranking of creditors in liquidation necessarily affect existing rights and some one or other of the competitors loses thereby. Accordingly, if in an enactment of this kind it were intended to exclude from its application persons in the position of the respondents, some specific enactment would be made. The circumstances that the change in the law is brought about in the form of an alteration in a code, which is supposed to express the existing and living law in its entirety, does not, it is true, affect the principle applicable, but it vividly illustrates the need of some express exception where it is intended to protect in the future one class of rights from the mass affected by general words. Their Lordships do not think that the presumption

1 Quebec, rev., 2nd August, 1907, 74 L. J. R., n.s., 106; 21 T. L. Rep., 735.

against retroaction compels the conclusion that it is to be pursued through all the consequences of the main enactment, and they deem its true application in the present instance to be merely to limit article 2005 to abandonments occurring after it came in force.

LESSOR AND LESSEE.

ASSIGNMENT OF LEASE.

McEachran v. Colton et al.[1]

1. A lease contained a covenant not to assign without the consent of the lessor. The lessee assigned to the appellant with consent. The appellant wished to re-assign to the original lessee.

2. It was held that this was an assignment within the covenant, and the assignee could be restrained by injunction from re-assigning without the consent of the lessor.

CONDITIONS OF LEASE.

Short v. Tuttfontein's Estate.[2]

3. Where land was leased exclusively for agricultural purposes, with liberty to the lessee to erect the necessary building for residence, but not to subdivide in order to sell or lease stands for building purposes:

4. The lessor was entitled to treat the lease as null and void and eject the assignees thereof on its being shown that they had advertised the land for sale in acre plots, and had issued plans showing a proposed subdivision into acre plots. The breach of condition was complete without actual transfer of the plots to purchasers.

See Legislation: *Retroactivity of law*; Privilege: *Lessor's privilege in case of insolvency.*

LIBEL.

BY SERVANT OF CORPORATION.

Citizens Life Assurance Company v. Brown.[3]

1. A corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment.

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1 South Australia, aff., 19th November, 1901, 85 L. T. R., 594.
2 Transvaal, aff., 3rd July, 1905, L. R., 1905, App. Cas., 584.
3 New South Wales, aff., 6th May, 1904, L. R., 1904, App. Cas., 423; 73 L. J. R., n.s., 103; 52 W. Rep., 176; 20 T. L. Rep., 497.

2. Although the servant may have had no actual authority, express or implied, to write the libel complained of, containing statements against the plaintiff which he knew to be untrue, if he did so in the course of an employment which is authorized, the corporation is liable.

LORD LINDLEY, page 425:—Counsel for the appellants contended, first, that the verdict was wrong in finding that Fitzpatrick acted in publishing the libel within the scope and in the course of his employment; and, secondly, that even if he did, yet the malice with which he wrote it cannot be imputed to the company. In support of this proposition reliance was placed on the well known judgment of the late Lord Bramwell, in *Abrath* v. *North-Eastern Ry. Co.*[1]

It would be convenient to dispose of the second question first. There is no doubt that Lord Bramwell held strongly to his opinion that a corporation was incapable of malice or motive, and that an action for malicious prosecution could not be maintained against a company. Lord Cranworth, in *Addie* v. *Western Bank of Scotland*,[2] had expressed a similar opinion as to the liability of corporations for frauds. But these opinions have not prevailed, and their Lordships are not prepared to give effect to them. If it is once granted that corporations are for civil purposes to be regarded as persons, *i.e.*, as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of *torts* and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and falacious. Their Lordships concur with the view of the Acting Chief Justice in this case, that if Fitzpatrick published the libel complained of in the course of his employment, the company are liable for it on ordinary principles of agency. Fitzpatrick's letter, although published on a privileged occasion, was not itself privileged; and not being privileged the letter must be treated as any other libel written and published by an officer of the company.

Page 427:—In considering the scope of his authority and employment their Lordships agree with the Acting Chief Justice in thinking that the jury were entitled to act on their own knowledge of Colonial business and habits. They were entitled to

1 11 App. Cas., 247, 250.
2 L. R., 1 H. L., 145.

consider the district placed under Fitzpatrick's supervision, and what would naturally be done in the Colony by a person in his position. He had no actual authority, express or implied, to write libels nor to do anything legally wrong; but it is not necessary that he should have had any such authority in order to render the company liable for his acts. The law upon this subject cannot be better expressed than it was by the Acting Chief Justice in this case. He said: "Although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act for his servant." This doctrine has been approved and acted upon by this Board, in *Mackey* v. *Commercial Bank of Brunswick*,[1]; *Swire* v. *Francis*,[2] and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber, in *Barwick* v. *English Joint Stock Bank*,[3] which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords, in *Houldsworth* v. *City of Glasgow Bank*,[4] and has been followed in numerous other cases.

CONTEMPT OF COURT.

See CONTEMPT OF COURT: *Innocent communication of scandalizing paper.*

INNUENDO.

AUSTRALIAN NEWSPAPER COMPANY v. BENNETT.[5]

3. The defendants published an article referring to the plaintiff's newspaper as the "Evening Ananias." The innuendo alleged was that the plaintiff was in the habit of publishing false news. The jury found a verdict for the defendants.

4. It was for the jury to determine in what sense the words were used, having regard to the context and circumstances of the case, and that their verdict ought not to be set aside.

PRIVILEGED COMMUNICATION.

JENOURE v. DELMAGE.[6]

5. No distinction can be drawn between one class of privileged communication and another; they all imply that the

1 1874, L. R., 5 P. C., 394
2 1877, 3 App. Cas., 106
3 L. R., 2 Ex., 259
4 5 App. Cas., 326
5 New South Wales, 9th April, 1894, 63 L. J. R., n.s., 105
6 Jamaica, rev., 1890, 19th December, L. R., 1891, 1 App. Cas., 73, 60 L. J. R., n.s., 11; 39 W. Rep., 388.

occasion rebuts the inference that the defendant is actuated by *mala fides*, and casts the burden of proving malice on the plaintiff.

6. Where the jury were told that the existence of privilege was contingent upon whether, in their opinion, the defendant honestly believed his volunteered communication to be true, and that the burden of proof to that effect was upon him, held, that this was misdirection, and that a verdict for the plaintiff must be set aside.

LORD MACNAGHTEN, page 38:—Notwithstanding some *dicta* which, taken by themselves and apart from the special circumstances of the cases in which they are to be found, may seem to support the view of the Chief Justice, their Lordships are of opinion that no distinction can be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege. "The proper meaning of a privileged communication," as Parke, B., observes—*Wright* v. *Woodgate*[1] is only this: that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." There is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any communication made from a sense of duty, legal, moral or social. The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case *bonâ fide* is always to be presumed.

Their Lordships consider the law so well settled that it is not in their opinion necessary to review the authorities cited by the Chief Justice. The last case on the subject is *Clark* v. *Molyneux*[2] to which, unfortunately, the attention of the Supreme Court was not called. That was a case, not of master and servant, but of communication volunteered from a sense of duty. A verdict was found for the plaintiff. But it was set aside by the Court of Appeal on the ground of misdirection. In giving his judgment, Cotton, L.J., used the following language, every word of which is applicable to the present case. "The burden of proof," he said, "lay upon the plaintiff to show that the defendant was actuated

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1 2 C. M. & R., 577.
2 3 Q. B. D. 237

by malice; but the learned judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did *bonâ fide*, and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty."

See CONTEMPT OF COURT: EVIDENCE.

LICENSE.

GRANTING OF LICENSE.

NEWFOUNDLAND STEAM WHALING COMPANY v. GOVERNMENT OF NEWFOUNDLAND.[1]

1. Licenses under the Newfoundland Whaling Industry Act, 1902 (2 Edw. VII., ch. 11), can only be granted by the Governor-in-Council in the manner prescribed by the Act.

2. A letter from a minister of the Crown containing a promise to grant a license does not operate as a license, even when the license fee has been paid and accepted by the Government.

SIR ARTHUR WILSON, page 403:—The system of licenses and the machinery for carrying it into effect are created by the statute, and, as in all such cases, the provisions of the statute must be complied with. The license must be granted by the Governor-in-Council, and it must contain what the Act requires. The receipt does not purport to be issued by the Governor-in-Council. It contains no words appropriate to the grant of a license. It does not, either by its own language or by reference to any other document, define the area over which it is to take effect. The memorandum at the foot of the license as issued, assuming (which is not clear) that that memorandum forms part of what is verified by the seal of the Colony and the test of the Governor, could not make that a license within the Act which was not so in fact. And to give to the memorandum the effect suggested would be to make it contradict the express terms of the official document to which it is appended. Their Lordships are clearly of opinion that the receipt was not a license.

It is equally impossible to accept the contention that there was a contract to grant the license as claimed. To support the argu-

1 Newfoundland, aff., 7th July, 1904, L. R., 1904 App. Cas., 399; 20 T. L. Rep., 566.

ment it would be necessary to attribute to every document a meaning which it cannot bear. The argument assumes that the letter of November 13th, 1902, amounted to a promise to grant a license. The letter contains nothing of the kind. The argument assumes that the receipt of December 15th was an acceptance of the limits specified in the appellants' application. It contains nothing of the kind. So that even assuming that the difficulties created by the statutory procedure could be got over, and that every documents was issued by the competent authority, the contention would wholly fail on the facts. It was also argued, but not very strenuously, that the Government was in some way estopped from denying the appellants' right to what they claim. Their Lordships agree with the majority of the learned judges in the Supreme Court that there is no room in law for such a contention in the present case. They also think that there is no ground for it in fact, because they cannot find anywhere any representation on behalf of the Government on which the appellants could act that the license about to be issued embodied the limits defined in the appellants' application.

REVOCATION BY BY-LAW.

HULL ELECTRIC COMPANY v. OTTAWA ELECTRIC COMPANY.[1]

3. Under a by-law of the Hull City Council, afterwards declared valid by the appellants' incorporating Act (Quebec, 58 Vict., ch. 69), the appellants obtained an exclusive right of establishing a system of electric lighting for a certain term of years in the said city, and, thereupon sued to revoke a license previously granted by the city to the respondents for a similar purpose:—

4. It was decided that at the time of the by-law the city did not themselves revoke the license to the respondents under which they were actually supplying electric light to the municipality, nor give to the appellants the right to have it revoked, and that the respondents were free to carry on their operations until revocation was effected.

LIEN.

DISCHARGE.

BANK OF AFRICA v. SALISBURY GOLD MINING COMPANY.[2]

1. A right of a lien may be discharged by an agreement between the creditor and the debtor, giving the creditor new and special powers with respect to part of the subjects covered

1 Quebec, aff., 22nd February, 1901, L. R., 1902, App. Cas., 237.
2 Natal, aff., 13th February, 1892, 66 L. T. R., N. S., 237

by such lien conceived in terms implying that he is not to have recourse against the remaining subjects.

2. But the fact that a debtor has agreed to give his creditor authority to sell part of the subjects without notice upon his making default, while indicating an intention that the burden of the debt shall be cast in priority upon the subjects to which the authority relates, is not sufficient to warrant the inference that the creditor is restricted to these subjects and is not to realize the other subjects of his security if necessary.

See BANKS AND BANKING: *Lien on shares.*

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MANDAMUS.

AGAINST ATTORNEY-GENERAL.

CASGRAIN v. ATLANTIC AND NORTH-WEST RAILWAY COMPANY.[1]

1. A writ of mandamus cannot issue to compel the Attorney-General to proceed with any information at the instance of a relator.

See ATTORNEY-GENERAL: *Power to discontinue suit.*

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1 Quebec, aff., 9th February, 1895. 64 L. J. R., n. s., 88; L. R. 1895. App. Cas., 296; 72 L. T. R. 369.

DELAY.

BROUGHTON v. COMMISSIONER OF STAMPS.[1]

2. A mandamus will not [illegible] granted for the purpose of recovering an excess of duty paid to the revenue, where there has been unreasonable delay in the application from the date at which it was ascertained that the amount charged was in excess of what was due.

MALICIOUS PROSECUTION.

See DAMAGES; *Eod. vis.*

MARRIAGE.

DISSOLUTION.

LEMESURIER v. LEMESURIER ET AL.[2]

1. There is no recognized rule of general law to the effect that a matrimonial domicile gives jurisdiction to dissolve marriage.

2. According to International Law the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage.

LORD WATSON, page 875: —When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. The opinion expressed by the English common law judges in *Lolley's* case[3] gave rise to a doubt whether that principle was in consistency with the law of England, which at the time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled, and the law of England was, in their Lordships' opinion, correctly stated by Lord Westbury in *Shaw v. Gould*,[4] in these terms: "The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects is competent to pronounce a similar decree between English subjects who were married in England, but before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bonâ fide* suit without collusion or concert as a position consistent with all the English decisions, although it may not be consistent with the [illegible]

1 New South Wales, aff., 29th November, 1898, 68 L. J. R., n.s., 36
2 Ceylon, aff., 29th June, 1895, 72 L. T. R., 877, 64 L. J. R., n.s., 9[illegible]
3 Russ & Ry., 237
4 L. T. Rep., 833, page 840; L. Rep., 3 H. [illegible] 85

lution commonly cited as the resolution of the judges in *Lolley's* case. On the other hand, a decree of divorce *a vinculo* pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority.

His Lordships here makes an examination of the authorities on the theory of matrimonial domicile as distinguished from the domicile of succession.

See HUSBAND AND WIFE.

MARTIAL LAW.

DIFFERENCE WITH ORDINARY COURTS OF JUSTICE.

TILONKO v. ATTORNEY-GENERAL OF NATAL.[1]

1. There is no analogy between courts martial, so-called, administering punishments and restraining acts of repression and violence under the supervision of a military commander and the regular proceedings of courts of justice.[2]

JURISDICTION.

ATTORNEY-GENERAL OF THE CAPE OF GOOD HOPE v. REENEN.[3]

2. There is no jurisdiction in a civil court to review a sentence of judgment of a court of martial law. A martial law court is not a court of record, and the administrator, even though he happen to be also a civil magistrate, and describe himself in a memorandum as acting in the double capacity, must be taken to have acted solely in the administration of martial law.

STATE OF WAR.

MARAIS v. GENERAL OFFICER COMMANDING, CAPE OF GOOD HOPE.[4]

3. Where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities.

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1 Natal, 2nd November, 1906, L. R., 1907, App. Cas., 93; 95 L. T. Rep., 853.

2 The local statute of 1906, of Natal, declared that "no appeal shall lie in respect of same," that is, sentences of Courts martial.

3 Cape of Good Hope, rev., 9th December, 1903, 73 L. J. R., n. s. 13, 20 T. L. Rep., 90.

4 Cape of Good Hope, 18th December, 1902, 50 W. Rep., 273; 18 T. L. Rep., 185.

Should martial law be proclaimed over certain districts the civil courts, though permitted to continue for ordinary purposes, have no authority over military tribunals.

See APPEAL; COURT MARTIAL.

MASTER AND SERVANT.

DISMISSAL FROM SERVICE.

CLOUSTON & CO. v. CORRY.[1]

1. There is no fixed rule of law defining the degree of misconduct which will justify dismissal from service.

2. It is a question for the jury whether the degree of misconduct was inconsistent with the fulfilment of the express or implied conditions of service, so as to justify dismissal.

3. The judge should not submit any issue to them if, in his opinion, no evidence of justification has been given. If he submits the issue he should direct, guide and assist them: direct, by informing them of the nature of the acts which, as a matter of law, would justify dismissal; guide, by calling their attention to the material facts; assist, in a manner and to an extent which there is no reason to define.

4. Misconduct inconsistent with the fulfilment of the expressed or implied conditions of service will justify dismissal.

LORD JAMES, of Hereford, page 129:—In the present case the tribunal to try all issues of fact was a jury. Now, the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the expressed or implied conditions of service will justify dismissal. Certainly when the alleged misconduct consists of drunkenness there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication may be habitual and gross, and directly interfere with the business of the employer, or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity

1 New Zealand, rev., 1st December, 1905, L. R., 1906, App. Cas., 122; 54 W. Rep., 382; 75 L. J. R., n.s., 20.

and no way connected with or affecting the employer's business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts—and is a question of fact. If this be so, the questions raised in the present case had to be tried by the jury.

But in cases where the trial must so take place, the presiding judge has important duties to fulfil. It is for him to say whether there is any evidence to submit to the jury in support of the allegation of justifiable dismissal. If no such evidence has, in his opinion been given, he should not submit any issue in respect of such allegations. The judge may also direct, guide, and assist the jury. He may direct by informing them of the nature of the acts which, as a matter of law, will justify dismissal. He may guide them by calling their attention to the facts material to the determination of the issues raised, and he may assist them in a manner and to an extent there is no reason to define. There have been judges—more numerous in the past than in the present—who possessed and exercised the power of addressing a jury in terms of apparent impartiality, and yet of placing before them views which seldom failed to secure the verdict desired by the judge to be recorded.

Some trace of the exercise of this influence may be found in the following terms in which Sir Frederick Pollock guided the jury in the case of *Horton* v. *McMurtry*[1]: "Gentlemen, I believe it is for you to decide whether this was a proper ground of dismissal—but if it be a matter of law..... my opinion is that it is a good ground of dismissal." The jury found for the defendant.

For these reasons their Lordships are of opinion that the learned Chief Justice was correct in submitting the issues of fact to the jury, and that in this respect the judgment given by the majority of the Court of Appeal is also correct.

See EMPLOYER AND WORKMAN; CONTRACT: *Wages by measure*; RESPONSIBILITY: *Eod. vis.*

MERCHANT SHIPPING ACT.

CONSTRUCTION.

OWNER OF THE S.S. "KWANG TUNG" v. OWNERS OF THE S.S. "NGAPOOTA," RE THE "NGAPOOTA."[2]

1. Article 18 of the regulations under the Merchant Shipping Act, which says: "Every steamship when approaching

1 5 H & N, 667; 29 L.J. (Ex.), 260.
2 Straits Settlements, rev., 22nd May, 1896. L. R., 1897, App. Cas., 391.

another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary," is sufficiently complied with though a delay of a few seconds has occurred.

2. The court is not bound to hold that compliance must be made the very moment when danger becomes apparent.

MINES AND MINING.

CONSTRUCTION OF CANADA MINING REGULATIONS.

CHAPPELLE ET AL. v. REX.[1]

1. Section 17th of the Mining Regulations passed under the Dominion Lands Act (Revised Statutes of Canada, ch. 54), does not on its true construction extend to the holder of a grant for placer mining the same privileges as to a renewal of his grant which are accorded to the holder of a quartz mining grant.

2. The placer miner on renewal (to which he has no absolute, but only a preferential right) holds under an annual grant in substitution for, but not in continuation of his original grant. And the renewed grant is subject to all such regulations as may be in force at the date when it comes into operation, whether or not it was made during the currency of an existing grant:—

3. It was held that the Governor-in-Council has power to make regulations requiring the placer miner to pay a percentage on the proceeds realized from the grant.

4. Such an imposition, called a royalty, is not a tax, but is a reservation which the owner in fee is entitled to make out of his grant.

5. Regulations did not take effect till the expiration of a period of four weeks from the date of the first publication.

LORD MACNAGHTEN, page 132: The main contention on behalf of the suppliants was that a placer miner had an absolute right to the renewal of his grant for a term of five years on the conditions of the original grant and subject only to the regulations of the original grant, and subject only to the regulations in force when that grant was obtained.

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1 Supr. C., Canada, aff., 2nd December, 1903, L. R., 1904, App. Cas., 127; 89 L. T. R., 513; 73 L. J. R., n.s., 18; 20 T. L. Rep., 75

Now, the Dominion Lands Act (chapter 54 of the Revised Statutes of Canada, 1886) in sect. 47 declares that "lands containing coal or other minerals, whether in surveyed or unsurveyed territory, ...shall be disposed of in such manner and on such terms and conditions as are from time to time fixed by the Governor-in-Council by regulations made in that behalf." Under this statute regulations for the disposal of mining claims had been made in 1887. These regulations were in force in the Yukon Territory when Chappelle first lodged an application for a grant for placer mining in respect of a claim in Hunter Creek, known as "Fractional Mining claim No. 3a below discovery." Placer mining, speaking roughly, consists in collecting and washing for gold the superficial detritus. It differs from quartz mining mainly in this—that whereas quartz mining requires expensive machinery, placer mining, for the most part, is carried on by manual labour. The regulations of 1889 dealt both with quartz mining and placer mining, and, as might be expected, dealt with the two methods in a different manner. The quartz miner having complied with the prescribed conditions, and having paid the required fee, obtains from the agent of Dominion Lands a receipt according to Form B in the schedule, authorizing him to enter into possession of the location applied for, and subject to its renewal from year to year, as "thereinafter approved during the term of five years from its date, to take therefrom and dispose of any mineral deposit contained within its boundaries," provided that he expends during each of the five years a sum of at least $100 in actual mining operation on the claim. Thereupon, subject to the payment of the prescribed fee the agent issues another receipt in Form C in the schedule, which entitles the claimant to hold the location for another year. At any time before the expiry of the five years the claimant is entitled to purchase the location for another five years, at so much per acre, on proving that he has complied with the requirements of the regulations in that behalf. As regards placer mining, the form of application for a grant for the same were to be those contained in Forms H and I in the schedule, and it was provided by sect. 20 that "the entry of every holder for a grant for placer mining must be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time." According to Form I the Minister of the Interior grants to the claimant for the term of one year..... the exclusive right of entry upon the claim as described for the miner-like working thereof and the construction of a residence thereon, and the exclusive right to all the proceeds realized therefrom." Form I then proceeds to state that the grant does not convey any surface rights in the claim or any right of ownership in the soil covered by the claim, and that the rights granted are those laid down in the Mining Regulations, and no more, and are subject to all the provisions of the said regulations, whether the same are expressed in the grant or not.

Now, if the case rested there, there would be nothing to support the claim advanced on behalf of the suppliants. The difficulty, such as it is, is created by sect. 17, which heads the provisions relating to placer mining and is expressed in the following terms: —

"Sect. 17. The regulations hereinbefore laid down in respect of quartz mining shall be applicable to placer mining so far as they relate to entries, entry fees, assignments, marking of location, agents' receipt, and generally where they can be applied, save and except as otherwise herein provided." The argument on behalf of the suppliants was based on this section. Much reliance was placed on the expression, "agents' receipts," which occurs in it. It was contended that the effect of making the regulations so far as they related to agents' receipts in the case of quartz mining applicable also to placer mining, was to extend to the holder of a grant for placer mining the right of renewal by annual grants for the full period of five years on the terms and conditions of the original grant.

It is certainly not easy to understand what is meant by the reference to agents' receipts in sect. 17. The words may be susceptible of some explanations not yet discovered. But, however their presence is to be accounted for, it appears to their Lordships that they cannot be construed so as to contravene the plain intention appearing on the face of the regulations and forms relating to placer mining, especially having regard to the saving and exception with which sect. 17 concluded. Their Lordships, therefore, are of opinion that the placer miner on renewal holds, under an annual grant, in substitution for but not in continuation of his original grant. He has no absolute right to renewal. He has, no doubt, a preferential right of renewal, because no interloper can be in a position to make the affidavit required to entitle him to a grant of the claim so long as the original occupant complies with the requirements of his grant and applies in due time for a renewal. Their Lordships are further of opinion that a placer miner obtaining a renewal grant in due course, holds his claim subject to all such regulations as may be in force at the date when the renewal grant comes into operation.

In some cases it appears that for the convenience of the miner a renewed grant was issued during the currency of an existing grant. It was argued that the miner having got possession of a renewal grant was not liable to be affected by regulations not then in force but coming into operation before the expiry of the existing grant. Their Lordships are unable to accede to this argument. Their Lordships think that a renewal grant must be subject to all regulations in force at the date when it comes into operation. It was further argued on behalf of the suppliants that the Governor-in-Council had no power to make regulations requiring the placer miner to pay a percentage on the proceeds realized from his claim. Such an imposition it was urged was

contrary to the terms of the grant which could only be imposed by authority of Parliament. Their Lordships do not think that there is any substance in either of these objections. The imposition, though it may be regarded as a tax in one point of view, is, in their Lordships' opinion a reservation out of the grant which it was competent for the grantor as owner in fee to make. And their Lordships agree with the Supreme Court in thinking that the expression "exclusive right" in the grant does not mean a right exclusive of the Crown, but a right exclusive of all persons other than the Crown.

In the result, therefore, their Lordships are of opinion that the appeals fail.

Their Lordships are further of opinion that the cross-appeal on behalf of the Crown fails also. That depends upon a very short point. By the Dominion Lands Act, sect. 91, it was provided that every order or regulation made by the Governor-in-Council shall have force and effect only after the same has been published for four successive weeks in the *Canada Gazette*. Now, the regulations under which the claims to be entitled to the payment which is the subject of the cross-appeal had been published in four weeks from the date of the first issue had not then expired, and, therefore, it seems to their Lordships impossible to contend that those regulations had been published in the *Gazette* for the period required by the Act, and that Chappelle's renewal grant was subject to them.

Two further contentions were advanced on behalf of the Crown which do not seem to their Lordships to require a serious answer. It was said that this exaction to which Chappelle was compelled to submit at the peril of forfeiting his grant was a voluntary payment on his part. It was no more voluntary than the payment which Custom House officials exact from a traveller in respect of dutiable goods. It was also said that the Crown having exacted this payment from Chappelle could not, when it was determined that the Crown had no right to the money, safely return it to the person from whom it was taken, but that there must be a judicial inquiry which might be prolonged indefinitely for the purpose of satisfying the Crown that no one but Chapelle was entitled to the refund. It is certainly a novel proposition that A, having taken money from B wrongfully is entitled before he restores it to B, to proof of his title. This contention, though it seems to have found favour with the Court of first instance, is, in their Lordships' opinion, contrary to principle.

INJUNCTION. CROUDACE v. ZOBEL.[1]

6. Where a plaintiff has exercised a definite statutory right to apply for a lease, he is entitled to an injunction to restrain

1 New South Wales, aff., 16th December, 1898, 68 L.J.R., n.s., 47.

operations which may have the effect of injuring or destroying the subject-matter of his application while it is still pending.

MONTREAL GAS COMPANY.

RIGHT TO CUT OFF GAS.

MONTREAL GAS CO. v. CADIEUX.[1]

1. By the true construction of sect. 20 of the Canada Act (12 Vict., ch. 183), borrowed from the Gasworks Clauses Act, 1847 (Imperial Parliament), the appellant company is authorized to cease supplying the respondent with gas at any of his houses on his neglect to pay its bill for any one of them. There is nothing in the section to limit the authority of the company to the particular building in respect of which there has been default, and such a limitation cannot be implied.

See STATUTES: *Construction.*

MUNICIPAL CODE.

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1 Supr. C., Canada, 28th July, 1899. L. R., 1899, App. Cas., 589

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OWNERS OF NORWEGIAN S.S. "NORMANDIE" v. OWNERS OF BRITISH S.S. "PEKIN," RE THE "PEKIN."

1. Article 22nd of the Maritime Rules, which relates to vessels "crossing so as to involve risk of collision," must be distinguished in its application, (1) as regards vessels navigating to open sea; (2) as regards vessels passing along the winding channels in rivers. In the latter case the vessel must follow, and must be known to intend to follow, the curves of the river bank:—

2. The defendant vessels, though she ported her helm, kept the course prescribed by the nature of the locality; and at the moment of porting, the vessels were not crossing vessels within the meaning of art. 22nd since the reasonable inference, having regard to the locality and their previous courses, was that they would avoid collision.

NATURALIZATION.

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1 China and Japan, aff., 3rd July, 1877, L. R., 1897, App. Cas., 532

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PARISHES (CATHOLIC).

CANONICAL AND CIVIL JURISDICTION.

ALEXANDRE ET AL. v. BRASSARD ET AL.[1]

1. Under Revised Statutes of Quebec, tit. ix., ch. 1, every decree for the canonical erection of a new parish which is valid according to ecclesiastical law is sufficient foundation for proceedings with the view of obtaining the civil recognition of

1 Quebec, aff., 9th February, 1895, L. R., 1895, App Cas., 301; 72 L. T. R., 366; 64 L. J. R., n.s., 83

that parish. No objection thereto can be taken on the ground of antecedent irregularity of procedure.

2. Proceedings before the commissioners of the diocese with a view to such civil recognition are not subject to the review or control of a court of justice.

3. An objection to the formation of a new parish, on the ground that one of the old parishes dismembered for that purpose was in debt, is valid under sect. 3380 of Revised Statutes of Quebec, but where the debt relied on was contracted by the Fabrique, it must be proved that the Fabrique was unable to pay it, and that a levy on the Roman Catholic freeholders of the parish has been duly authorized.

4. A debt of the "Fabrique" is not a debt of the parish within sect. 3380 of the Revised Statutes so as to prevent the division of the parish till it is paid.

LORD MACNAGHTEN, page 307:—It was not disputed at the Bar that the decree of the Archbishop was a good and valid decree for all ecclesiastical purposes, and that the parish of St. Blaise has been canonically erected. The argument on behalf of the appellants was that the ecclesiastical authorities were not properly put in motion, and that although it was not competent for the court to set aside the canonical decree, the court was at liberty to inquire into the proceedings which gave rise to it, and they contended that if these proceedings were found not in accordance with the provisions of the law, the decree could not be treated as a decree available for the purpose of founding civil recognition.

Their Lordships cannot take this view. It appears to them that the provision in question is not a limitation on the jurisdiction of the ecclesiastical authorities, or a condition precedent to the validity of all subsequent proceedings. It is rather in the nature of a rule of procedure, and in their Lordships' opinion, it is for the ecclesiastical authorities, and for them alone, to decide as to the validity of any objection founded on alleged non-compliance with it.

In connection with this point it will not be out of place to observe that the articles relating to the civil erection of parishes from the subject of a separate and distinct sub-section. The first article in that sub-section in its opening words speaks of "Every decree for the canonical erection of a new parish." The words are general. There is nothing referring them back to what has gone before, or confining the case to a decree made in the manner prescribed by the preceding sub-section. It seems to their Lordships, therefore, that according to the grammatical construction of the language of this sub-section, as well as according to the

good sense of the matter, every decree for the canonical erection of a new parish, which is valid according to ecclesiastical law, is a sufficient foundation for proceedings with the view of obtaining civil recognition. Otherwise a canonical decree, valid according to ecclesiastical law, but having the defect or flaw which the appellants attribute to the Archbishop's decree in this case, would for all time be a bar to civil recognition. For there are no means of curing this defect or getting rid of the difficulty.

Their Lordships have dealt with this matter because it is of general interest, and it formed the principal subject of the arguments addressed to them. At the same time they desire to say that they see no reason to differ from the conclusion of the learned judges of the Court of Queen's Bench, who have held that proceedings before the Commissioners, in accordance with the statutory provisions relating thereto, with a view to the civil recognition of a new parish are not subject to the review or control of a court of justice. The functions of the Commissioners in this respect are simply to inquire and report to the executive Government, and, although they are empowered to dismiss an opposition made to the civil recognition of a canonical decree, they are required to report the dismissal to the Lieutenant-Governor when they transmit the canonical decree to him. Persons who may consider themselves aggrieved by the dismissal of their opposition are not without remedy. But their remedy is not to be sought in a court of law. It appears from the judgment of Wurtele, J., as well as from Baudry, J.'s Treatise (page 51), that it is the practice for the executive Government before granting civil recognition to listen to all remonstrances and objections properly brought before them. "In all such cases," says Wurtele, J., "the parties are always heard and the circumstances are carefully considered before any action is taken. It is within my own knowledge," he adds, "that on several occasions, after having considered the objections made to the civil erection, the Lieutenant-Governor, on the advice of the Executive Council, has declined to issue the proclamation and to give civil effect to a Canonical Decree."

The objection founded on the alleged debt of the parish of St. Jean l'Evangéliste is a more serious objection in a legal point of view. For article 3380 provides that nothing in the chapter shall extend to any parish which has contracted debts for the erection of churches or parsonage houses therein until the said debts are paid and satisfied. In the present case, however, the alleged debt is not a debt of the parish. It was not contracted by the parish. It was contracted by the Fabrique, and the Fabrique apparently has sufficient means to discharge the debt, or so much of it as remains unpaid, by the stipulated instalments, without throwing any part of it upon the parish. A debt of the Fabrique may, no doubt, become a debt of the parish. But to

bring about that result two things must concur. In the first place the Fabrique must ascertain the impossibility of paying the debt by means of the revenues at its disposal, and in the next place it must obtain an authorization for a levy upon the Roman Catholic freeholders of the parish at a meeting of the parish regularly called.

PARLIAMENT.

See Legislature.

PARTNERSHIP.

ADMINISTRATION.

Trimble v. Goldberg.[1]

1. The respondent and the two appellants, under a partnership arrangement in 1902, bought, with a view to resale, the properties of H., consisting of stands or plots of land laid off for building, and shares in a company entitled to other stands in the same locality. The appellants, apart from the respondent, purchased the company's other stands and made profits.

2. In a suit by the respondent for an account thereof, the court below held that, though the stands so purchased were not within the scope of the partnership of 1902, they were connected with it indirectly; that the purchase thereof by the appellants was secret and injurious to the common interest, and that the respondent was entitled to share in the benefit thereof:

3. This judgment cannot be supported on authority or on any recognized equity.

4. The purchase, not being within the scope of the partnership, was not shown to have been in rivalry or any other connection therewith, nor in any way injurious thereto.

Lord Macnaghten, page 499:—The purchase was not within the scope of the partnership. The subject of the purchase was not part of the business of the partnership or an undertaking in rivalry with the partnership, or, indeed, connected with it in any proper sense.

Page 501:—No authority was cited in support of the conclusion at which the Court of Appeal arrived. But there are several cases in which arguments similar to those which prevailed with that

1 Transvaal, rev., 16th July, L.R., 1906, App. Cas., 494; 95 L.T. Rep., 163; 75 L. J. R., n.s., 92.

Court have been urged, and urged unsuccessfully. Perhaps the most instructive cases are: *Dean* v. *MacDowell*,[1] and *Cassels* v. *Stewart*.[2] The two cases have much in common, and it will be sufficient to refer to the latter.

In *Cassels* v. *Stewart*,[3] which was an appeal from two concurrent judgments in Scotland, three gentlemen, Reid, Cassels and Stewart, were partners in an undertaking called the Glasgow Iron Company. The contract of co-partnership contained an article forbidding any partner to assign his interest, or give any person or persons a right to interfere with the business, and declaring further that any such assignation should be of no effect as regards the company. There was also a clause declaring that on the retirement of a partner, the remaining partners should have power to buy his interest at amount standing to his credit at the last balance. Reid sold all his interest to Stewart. Reid's name, however, remained on the books and he signed all deeds relating to the business until his death, which occurred seven years after the sale. Cassels was not till then informed of the arrangement. When he found it out he claimed to participate in the purchase on the ground—(1) that a mandate had been given to Stewart to buy Reid's interest for the partnership; (2) that under the terms of the partnership agreement, the purchase could only be legally made with his consent; and (3) that Stewart had secretly acquired a benefit for himself within the scope of the partnership business. It was held that the alleged mandate was not proved. But it was argued by Sir F. Herschell, then Solicitor-General, and the Lord Advocate, that putting aside the alleged mandate "the agreement was entered under circumstances as entitled the appellant to participate in it," "the acquisition of the shares of out-going partners..... was one of the objects of the company." "Apart from the express terms of the contract, the secret agreement by which the respondent acquired for himself alone a benefit falling within the scope of the partnership business was a breach of the good faith of the partnership, and when such a benefit was acquired, each partner had a right to demand that it should be communicated to each of them equally, on general principles it was inequitable, having regard to the fiduciary relations due to each other, that such an agreement should be made behind the back of another partner." Without calling on the respondent, the House, consisting of Lord Selborne, L.C., and Lords Penzance, Blackburn and Watson, dismissed the appeal.

It seems to their Lordships that the decision of the Supreme Court of the Transvaal in the present case cannot stand with the decision in *Cassels* v. *Stewart*. There was at least as close a

1 1[illegible] Ch. D., 345
2 1881, 6 App. Cas., 64.
3 6 App. Cas., 64.
4 6 App. Cas., 64.

connection between the partnership and the partner's purchase in that case as there is in this. In their Lordships' opinion the order under appeal cannot be supported on authority or on any recognized doctrine of equity.

DUTY ON SHARES.

THE COMMISSIONER OF STAMP DUTIES v. SALTING ET AL.[1]

5. Two persons, who were resident in England, carried on in partnership the business of graziers and sheep farmers in New South Wales by their agent; the assets of the partnership business consisting of lands, live stock, etc. Upon the death of one of the partners:

6. It was held, that the share of the deceased partner in the business was situated in New South Wales, the place where the business was carried on, and that, therefore, probate duty was payable in New South Wales upon that share.

See ACQUIESCENCE: *In articles of association.*

PATENT.

CANCELLATION.

AFRICAN GOLD RECOVERY COMPANY v. HAY.[2]

1. Where the High Court has pronounced a patent to be invalid, it can proceed to order it to be cancelled through the Attorney General is not a party to the action.

EXPIRATION OF.

DOMINION COTTON MILLS COMPANY v. GENERAL ENGINEERING COMPANY OF ONTARIO.[3]

2. By the true construction of sect. 8 of the Canadian Patent Act, ch. 61 of the Revised Statutes of Canada, as amended by Canadian Act 55 and 56 Vict., ch. 24, sect. 1, a Canadian patent expires as soon as any foreign patent for the same invention existing at any time during the continuance of the Canadian patent expires.

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1 New South Wales, rev., 22nd July, 1907, 23 T. L. R., 723.
2 Transvaal, aff., 22nd June, 1904, 91 L. T. R., 214
3 Supr. C., Canada, rev., 23rd July, 1902, L. R., 1902, App. Cas., 570; 87 L. T. R., 186; 71 L. J. R., n.s., 119; 18 T. L. Rep., 766.

3. A British patent is a foreign patent within the meaning of the Canadian Patent Act.

LORD LINDLEY, page 573:—It is common ground, and their Lordships concur in the view, that a British patent is a foreign patent within the meaning of the Canadian Patent Act; and that the British patent and the Canadian patent were for the same invention, and that the former expired in March, 1897. The whole question, therefore, turns on the meaning and legal effect of the words: "under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires."

The words "if a foreign patent exists" invite the question—When—what time is referred to? The Supreme Court have held (by a majority) that these would refer to the date of the application for the Canadian patent; the Exchequer Court held that they referred to the date of the grant of the Canadian patent. This last construction is sufficient for the appellants in this particular case; but their counsel contended that even this construction is too narrow, and that the words refer to any time during the continuance of the Canadian patent, the duration of which is made to depend on the earliest termination of any foreign patent for the same invention. Their Lordships are of opinion that this wide construction of the words is the true one. They are unable to discover any sufficient reason for putting any more restricted meaning on the words. The language is clear and imperative.

Their Lordships can only understand it as declaring that under circumstances, as soon as any foreign patent for the same invention expires, the Canadian patent, if then existing, shall expire also. They can find no limit as to time except that the foreign patent must both exist and expire after the Canadian patent has been granted, and before it has ceased from any other cause. The French version of the Act is, if possible, even clearer than the English version. Both, however, express the same meaning.

The Supreme Court were naturally influenced by a prior decision of theirs on sect. 8 as it stood in its original shape. In *Dreschel v. Auer Incandescent Light Manufacturing Co.*[1] it was held that similar words in the original section referred to the date of the grant, and that a foreign patent obtained subsequently to the grant of a Canadian patent on expiring during its continuance did not affect its duration.

Their Lordships do not think it necessary to reconsider the case; but, assuming it to have been correct, having regard to sect. 8 as it then stood, they are unable to concur in the view that in sect. 8 as it now stands the date of the application has become the date to which the last clause applies.

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1 6 Ex. C. R., 55; 28 Sup. C. R., 608.

FOR IMPROVEMENTS.

BROWN ET AL. v. JACKSON.[1]

4. When a patent is not for a new machine, but for improvements upon the mechanism of an old and known machine, the exclusive right of the patentee cannot be permitted to exceed the exact terms of his specification.

INFRINGEMENT.

CONSOLIDATED CAR HEATING COMPANY v. CAINE.[2]

5. In an action for infringement of a patent, if the merit of the invention consists in the idea or principle which is embodied in it, and not merely in the means by which that idea or principle is carried into effect, the patentee must show that the idea or principle is new; and must fail if the merit of his invention lies merely in a new combination of known features.

6. Where the appellants, patentees for improvements in hose coupling, had produced a couple of pipes or hose attached to two railway cars, so as to secure a steam-light fastening which would permit an automatic separation of the two ends when the cars were uncoupled; while the respondent's coupler was in all material respects the same as the appellant's and produced the same result, but omittted the use of one particular feature called a "rib" or hinge-joint, which was proved to have been a very material element in the success of the appellant's coupler, their specification showing that they never contemplated its omission, or that their invention could be operated without it: --

7. It was held, that there had been no infringement, for the respondent's coupler was shown to have been a different and a new way of achieving the end contemplated by the appellant's coupler.

LORD DAVEY, page 517: -In *Proctor* v. *Bennis*,[3] Cotton, L.J., says: "In my opinion omissions and admissions may be very material in considering whether, in fact, the machine of the defendant is an infringement of the combination which the plain-

1 Ceylon, rev., 18th May, 1895, L. J. R., n.s., 180.
2 Quebec, aff., 5th August, 1903, L. R., 1903, App. Cas., 509; 89 L. T. R. 224, 72 L. J. R., n.s., 110; 49 T. L. Rep., 692.
3 1887, 36 Ch. D., 240, page 256.

tiff claims; but if the defendant really has taken the substance and essence of the plaintiff's combination, the mere fact that certain parts are omitted, or certain parts added, cannot prevent his machine from being an infringement of the plaintiff's patent."

Not to multiply quotations, their Lordships will only cite further what was said by a learned judge in Scotland, where the patent law is the same as in this country. In *Gwynne* v. *Drysdale*[1] the President Inglis said: "I am not..... to be understood as seeing that an infringer, by merely omitting some immaterial part of the mechanism described in the specification, or substituting for such immaterial part some mechanical equivalent, will escape conviction if his machine contains all the essential and characteristic features of the patented combination. But if in the machine of an alleged infringer any [illegible] is omitted, then [illegible] alleged [illegible] is a different combination from that of the patentee. The omission of the material part may [illegible] The possibility of dispensing with [illegible] valuable discovery, or the omission may be made [illegible] for the purpose of [illegible] an infringement, [illegible] the combination [illegible] minus an essential part of it is no longer his combination."

Page 519: In determining the question whether [illegible] of the invention is taken, it is important [illegible] of the patent with reference to the [illegible] subject. For, if the [illegible] or principle which is embodied in it, and not merely in the means by which that idea or principle is carried into effect, a machine which is based on the same idea or principle may be an infringement, although the detailed means [illegible] effect may be somewhat different.

RIGHT TO EXTENSION.

SEMET AND SOLVAY'S PATENT.[2]

8. The lapse or expiration of foreign patents are circumstances to be considered in considering the question of the extension of British patent, but are not exclusive against such extension.

CARL PIEPER'S PATENT.[3]

9. In considering a petition for the prolongation of a patent in this country the fact that several foreign patents in respect of the same invention have already expired, and that the En-

1 1886, 3 Rep. Pat. Cas., 65.
2 8th December, 1894, 71 L. T. R., 674; 64 L. J. R., n.s., 41.
3 8th May, 1895, 72 L. T. R., 782.

glish patent is the only one surviving, though not an insuperable objection to a prolongation is one which the Judicial Committee will consider as a serious obstacle to granting a prolongation, unless very strong grounds for doing so are shown.

BOWES-BARFF PATENT.[1]

10. An extension of a patent will not be granted to assignees when the inventor has no legitimate interest in making the application himself.

LORD WATSON, page 37:—There is no case in which this Board has granted an extension of a patent to an assignee which did not directly or indirectly tend towards the benefit of an original inventor, who would, had there been an assignment, have been in a position to claim an extension himself.

HOPKINSON'S PATENT.[2]

11. Though the Patents, Designs, and Trade Marks Act, 1883, has, by its definition of "patentee," confirmed the right of the assignee of a patent to petition for its prolongation, assignees are not thereby placed on the same footing as inventors; and where the inventor has been adequately remunerated, an assignee who has not assisted to bring out or perfect an invention, but has bought it as commercial speculation, has no claim for a prolongation because the patent has proved unremunerative to him.

CURRIE AND TIMMINS' PATENT.[3]

12. A patent of great merit, in the perfecting and introduction of which the patentee had incurred loss, and which could only gradually replace existing machinery was considered a proper case to advise Her Majesty to grant an extension for a term of ten years.

PARSONS' PATENT.[4]

13. Prolongation for five years granted to a patent of conspicuous merit, by which, in one form of its application both at home and from the foreign patents for the invention, the

1 10th July, 1895, 73 L. T. R., 36
2 16th December, 1896, 75 L. T. R., 462; 66 L. J. R., n.s., 38; 13 T. L. Rep., 127
3 9th December, 1897, 67 L. J. R., n.s., 63
4 14th May, 1898, 67 L. J. R., n.s., 55

patentee had, if allowance were made for his services, made little if any profit, and in another application the profit would depend on the success of a company which had not started operations, and the prosperity of which would depend largely on the prolongation of the original patent.

IN RE THORNYCROFT'S PATENT.[1]

14. Where letters patent had been granted for "improvements in steam generators," and it was shown that the invention consisted of the combination of various parts, all or most of which were admittedly not new at the date of the letters patent; an extension was refused in the absence of evidence that the invention was of unusual merit.

15. Where patentees had incurred losses, these cannot be regarded as evidence of inadequate remuneration or attributable to unskillfulness in conducting their business.

HENDERSON'S PATENT.[2]

16. Where the petitioners are assignees who have purchased the patent as a commercial speculation, and the accounts do not show [illegible] the profits made by the inventor or by the petitioners [illegible] on for the extension of the patent will be refused.

17. Where the patentee has failed to push the invention in this country in the earlier part of the life of the letters patent, and foreign patents have expired, it will require a very strong case to induce the Judicial Committee to recommend a prolongation of the patent, though such circumstances are not in themselves conclusive against the petitioner.

PEACH'S PATENT.[3]

18. The extension of letters patent is an indulgence, and, on a petition for extension, the rule laid down by the Judicial Committee must be strictly followed, and no adjournment will be granted in order that information which ought to be before the Board may be supplied.

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1 25th February, 1899, L. R., 1899, App. Cas., 415; 68 L. J. R., n.s., 68

2 13th July, 1901, 85 L. T. R., 359; 70 L. J. R., n.s., 119; 17 T. L. Rep., 676.

3 18th December, 1901, 87 L. T. R., 153; 76 L. J. R., n.s., 98.

WUTERICH'S PATENT.[1]

19. On a petition for the extension of a patent the accounts must be presented in a complete and intelligible form.

20. An applicant will not, be permitted, except in very special circumstances, to supplement the accounts by oral evidence at the hearing.

VAN GELDER'S PATENT. IN RE THOMPSON.[2]

21. Where it appeared that the patented invention had no exceptional merit and involved no new principle, that the assignee of the patents had neither by himself nor his agents displayed suitable energy and business capacity in pushing them, and that the inventor was dead and could not possibly, if living, have derived advantage from their extension:—It was held that the prolongation must be refused.

22. The merit which entitles a patentee who has been insufficiently remunerated to ask for an extension of a patent must be of an exceptional character, different in kind and degree from the merit which is sufficient to sustain a patent.

23. An extension will not be granted when the original inventor has died after having made an assignment of all his interest in the patent, so that neither he nor his estate can derive any advantage from the extension.

LORD MACNAGHTEN, page 177:- The principal objection is that the invention as explained by Mr. Thompson has not that exceptional merit which would justify their Lordships in recommending a prolongation. The merit which entitles a patentee who has been insufficiently remunerated to claim an extension is different in kind and degree from that which is enough to sustain a patent. In the present case no new principle is involved. There is nothing that can be called real invention. Indeed, it would seem that any workman of ordinary skill, having his attention called to a Cyclone machine, and being told that its height was a serious inconvenience, might, by a few practical experiments, requiring little thought and little expenditure, have arrived at the same conclusion as Van Gelder.

It is not, perhaps, otherwise than significant that Mr. Thompson, who is a patent agent, and does not pretend to be an inventor, claimed at the Bar that he was substantially the inventor of the

1 18th February, 1903, 88 L. T. R., 306; 72 L. J. R., n.s., 60.
2 14th February, 1907, L. R., 1907, App. Cas., 174; 76 L. J. R., n.s., 44; 96 L. T. R., 333; L. R., 1907, App. Cas., 174.

Tornado, and that his final development was due as much to his suggestions as to Van Gelder's inventive faculty.

In the next place, there has been little energy and not much businesslike capacity displayed in pushing the invention, assuming that it was ever worth pushing. It matters little whether the fault lay with Mr. Thompson or the people Mr. Thompson employed.

IN RE FRIEZE-GREEN'S PATENT.[1]

24. Under the Patents Act, 1883, the Board has no power to entertain a petition for extension where there has not been any advertisement as prescribed by sect. 25, sub-sect. 1. It has no power to dispense with the express provisions of a statute.

LORD ROBERTSON, page 460: It is not within the competency of this Board to entertain a petition for extension when there has not been any previous advertisement. In sect. 25, sub-sect. 1, of the Patents Act, 1883, the words are: "A patentee may, after advertising in manner directed by any rules made under this section." The Board has occasionally—as in the case of *Lindon's Patent*,[2] where, before any rules had been under the Act of 1883, their Lordships allowed the advertisements required by the old rules to be inserted after the petition had been presented—made relaxation, in very special circumstances, of some of the provisions of the rules, but if their Lordships were to do what they are now asked to do, they would be dispensing, not with rules, but with the statute. The application must be refused.

PAYMENT.

EQUIVALENT TO CASH.

LAROCQUE V. BEAUCHEMIN ET AL.[3]

1. Any *bonâ fide* transaction between a company and a shareholder, which amounts, in fact, to a payment, is a "payment in cash" within art. 4772, sect. 1, of the Revised Statutes of Quebec, which is equivalent to sect. 25 of the English Companies Act, 1867.

LORD MACNAGHTEN, page 475:—Their Lordships are not prepared to dissent from the decision in *Spargo's Case*.[4] It is a decision of the highest authority. It was pronounced by James

1 1907, L.R., App. Cas., 1907, 460; 76 L.J.R., n.s., 105.
2 1897, 14 Rep. Pat. Cas., 643.
3 Quebec, aff., 7th April, 1897, 76 L. T. R., 473.
4 28 L. T. Rep., 1[illegible].

and Mellish, L.JJ., and the view which those eminent judges expressed had, as appears from their judgments, the approval of Selborne, L.C. Referring to *Fethergill's Case*,[1] in which sect. 25 of the Act of 1867 was considered, and in which judgment had been delivered only the day before by the Lord Chancellor and the Lords Justices, James, L.J., made the following observations, which are not inapplicable to the facts of the present case: "It was said by the Lord Chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section which would lead to such an absurd and unjustifiable result as this, that an exchange of cheques would not be payment in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be a payment in cash. In truth, it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within the meaning of the provision..... If a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money at once for the purchase of a property, and on the other side a *bonâ fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fethergill's Case*,[1] and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that, if the two demands are set off against each other, the shares have been paid for in cash..... Supposing the transaction to be an honest transaction it would, in a court of law, be sufficient for this court sitting in a winding-up matter. Of course, one can easily conceive that the thing might have been a mere sham or evasion, or trick, to get rid of the effect of the Act of Parliament, but any suggestion of sham, or fraud, or deceit, seems to be entirely out of the question in this case, because everybody in the company knew of the transaction; every shareholder of the company was present and was a party to the resolution; there was no deceit practiced on the creditor, nor was there any registration of these shares, except as shares paid up. This seems to me to dispose of the case. "It is a general rule in law," added Mellish, L.J., "that in every case where a transaction resolves itself into paying money by A to B, if the parties meet together and agree to set on demand against the other, they do not go through the form and ceremony of handing the money backwards and forwards." Even if this line of argument were less convincing than it appears to their Lordships to be, they would not be disposed to disturb an authority which has been accepted and acted on for more than twenty years. It is to be observed that in the Quebec

1 28 L. T. Rep., 124; L. Rep., 8 ch., 270.

Statute the expression "paid in cash" occurs in one place, and "paid in cash into the treasury of the company" in another, from which it may be inferred that "payment in cash" does not necessarily and in all cases mean payment into the "treasury of the company."

NORTH SYDNEY INVESTMENT CO. v. HIGGINS ET AL.

2. Where there is a sum of money in the hands of the vendor to a company specifically appropriated to the payment of the subscribers' shares in the company, and the company gives credit for that amount to the vendor and gets credit for the amount of purchase money, the shares are paid for "in cash" within the meaning of sect. 57 of the New South Wales Companies Act, which is identical with sect. 25 of the English Companies Act, 1867.

3. It is sufficient if the shareholders can show that their shares were, in fact, paid-up to the extent of the money in the vendor's hands.

LORD DAVEY, page 305:—Their Lordships do not think that the adoption and confirmation by directors of a contract made before the formation of the company by persons purporting to act on behalf of the company creates any contractual relation whatever between the company and the other party to the contract, or imposes any obligation whatever on the company [illegible] party. They think that the proposition maintained by the learned judge is opposed both to the principle and authority, [illegible] the judgment in the case of [illegible] referred to by the learned judge, [illegible] contrary effect.

Page 305:—Their Lordships think that this transaction was a payment in cash on the subscribers' shares on that date which would satisfy the statute in accordance with the decisions of the English courts in *Spargo's Case*,[2] and *Perrow's Case*,[4] and the decision of this Board in *Larocque* v. *Beauchemin*, [illegible] was a sum payable by Cliff to the Company for the specific purpose of paying up the shares and there was a like sum payable to the vendor for purchase money, and it was not necessary that the parties should go through the form of handing the money over and receiving it back, or giving cross cheques. It is sufficient if the shareholders can show that their shares are paid up to the extent of the money in Cliff's hands, although the payment was not made at the time or in the manner erroneously imputed by the directors.

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1 New South Wales, aff., 25th February, 1898, 80 L. T. R. 303
2 64 L. T. Rep., 1891, 1 Ch., 119
3 28 L. T. Rep., 153; L. Rep., 8 Ch., 407
4 30 L. T. Rep., 211; L. Rep., 9 Ch., 375
5 76 L. T. Rep., 473; 1897, App. Cas., 578

INSOLVENCY OF DEBTORS.

KENSINGTON LAND COMPANY v. CANADA INDUSTRIAL COMPANY.[1]

1. Under article 1092 of the Civil Code of Lower Canada an action to recover the balance of purchase money of land may be brought, although the time for payment has not arrived when the debtor has become insolvent or has diminished the value of the security.

See BANKS AND BANKING: *Payment of fraudulent cheque, Presentation of cheque for payment*; HYPOTHEC: *Eod. vo.*; INSOLVENCY: *Eod. vo.*

PETITION OF RIGHT.

See APPEAL: [illegible]

POSSESSORY ACTION.

TITLE TO LAND.

GODFRAY v. CONSTABLES OF THE ISLAND OF SACK.[2]

1. Possessory actions must be brought within a year and a day of the alleged *disseisin*, but the rule does not apply to real actions in which the title to land is in issue.

PRACTICE.

JUDGMENT ON MERITS.

KENT v. COMMUNAUTÉ DES SŒURS DE CHARITÉ DE LA PROVIDENCE.[3]

1. Where the judgment of the court below is reversed on questions not affecting the merit, the Privy Council will refer the case to the court of first instance for judgment.

LORD DAVEY, page 227:—Their Lordships were asked to hear the case upon its merit; but it is not the practice of this Board to sit as a court of first instance. No judgment had been delivered by the court below, and they could not, without injustice to the parties, take that course, and give a decision from which there would be no appeal.

1 Quebec, [illegible], 28th March 1903, L. R., 1903, App. Cas., 213.
2 [illegible] 1902, 87 L. T. R. [illegible]
3 Quebec, [illegible] March, 1903, L. R., 1903, App. Cas., 221

JURISDICTION TO CORRECT ERROR.

WILSON v. CARTER.[1]

2. Courts of Justice have power at any time to correct an error in a decree or order arising from a slip or accidental omission whether there is or is not a general order to that effect.

JURY TRIAL.

McARTHUR v. DOMINION CARTRIDGE COMPANY.[2]

3. In the Province of Quebec, [illegible] for judgment or a new trial, the function of the Court of Review, under the Code of Civil Procedure, is the same as that of the Court of Appeal in [illegible]. It is not their province to retry the case, but the verdict is [illegible] if it is one which the jury might reasonably find on the evidence, though it is not in accordance with the opinion of the judge at the trial, or of the court.

See JURY TRIAL: *J*[illegible]

PRESCRIPTION.

COMPUTATION OF DELAY.

DECOUNT v. CITY OF MONTREAL.

1. Where it was enacted by sect. 12 of 42 and 43 Vict. (Quebec), ch. [illegible], that any municipal elector might [illegible] the annulment of the corporate appropriation for a [illegible] within three months from the date thereof on the [illegible] of illegality, but that, thereafter, the right was [illegible] and the appropriation valid.

2. It was held, that on the expiration of the three months the electors statutory right was at an end, and could not be extended by any procedure clause which presupposed an existing right of action and regulated its exercises, and that art. 3 of the Canadian Code of Procedure which says, that: "If the day on which anything is to be done in pursuance of the law is a non-juridical day, such thing may be done with

1 New South Wales, 29th July, 1893, 9 T. L. Rep., 613.
2 Supr. C. Canada, Quebec, rev. [illegible] 1901, [illegible] R. [illegible]
3 Quebec, aff., 28th July, 1894, L. R. [illegible] Appl. Cas. [illegible] L. T. R., 354; 64 L. J. R. [illegible]

like effect on the following day," relate to matters of procedure only.

3. The last day of a delay of prescription created by a statute is not subject to the rule of procedure extending the delay to the following day when it expires on a non-juridical day.

LORD WATSON, page 644: The respondents do not dispute that when an action is depending, the rule upon which the appellant relies is applicable to the proceedings in the litigation. But they maintain that the statutory title of the appellant to petition the court and their own statutory immunity which arose immediately upon the cessor of his title are matters of right and not of procedure, and that the prescription by which his title is cut off and their immunity established is regulated by the provisions of the Civil Code.

The rule for which [illegible] is found in sect. 3 of the Code of Civil Procedure, which enacts as follows: "If the day on which anything ought to be done in pursuance of law is a non-juridical day, such things may be done with like effect on the next following juridical day." In the opinion of their Lordships that enactment refers exclusively to things which the law has directed to be done either by the plaintiff or the defendant in the course of a suit, and has no reference to the title or want of title in the plaintiff to institute to maintain it.

The enactment upon which the appellant chiefly relied was sect. 20 of the Quebec Statute (49 and 50 Vict., ch. 95). The Statute did not become law until the 25th of August, 1886, nearly two months after the present petition was brought, but is said to be declaratory. Section 20 is in these terms: "If the delay fixed for any proceedings, or for the doing of anything, expire on a non-juridical day, such delay is prolonged until the next following juridical day." The section appears to their Lordships to be essentially a procedure clause and to be in substance a re-enactment of sect. 3 of the Code of Civil Procedure. Its language is not calculated to suggest that a claimant may bring an action for recovery of land after the period of limitation has run, if he can show that the last day or days of that period was non-juridical and that his claim is preferred upon the first juridical day after its expiry. Yet that would be the logical result of giving effect to the argument of the appellant.

Their Lordships are satisfied that no question of procedure is raised by the circumstances of the present case; and they are also of opinion that sect. 12 of 12 and 13 Vict., ch. 53, is not controlled either by the Code of Civil Procedure or by sect. 20 of the Acts 49 and 50 Vict., ch. 95.

DAMAGES. *See* DAMAGES: *Rights of widows and children.*

RIGHT OF WIDOWS.

ROBINSON v. CANADIAN PACIFIC RAILWAY CO.[1]

4. The Civil Code of Lower Canada does not make it a condition precedent to the right of action given by art. 1056 to the widow of a person dying, as therein mentioned, that the deceased's right of action should not have been extinguished in his lifetime by prescription under section 2262.[2]

5. The death is the foundation of the right given by the former section, which is governed by the rule of prescription contained therein, and is exempt from the rule of prescription which barred the claim of the deceased.

LORD WATSON, page 506: —The appellant's claim is founded upon sect. 1056 of the Civil Code of Lower Canada, the first paragraph of which enacts that: "In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant relations have a right, [illegible] within a year after his death, to recover from the [illegible] committed the offence or quasi-offence, or his representatives, all damages occasioned by such death. The appellant brought [illegible] within seven months after her husband's decease, while the prescription thus made applicable to her statutory claim was still current." But sect. 2262 (2) of the Code provides that actions for bodily injuries "are prescribed for one year," saving the special provisions contained in article 1056 and cases regulated by special laws. Seeing that Patrick Flynn lived for nearly [illegible] months after the date of the injuries which caused his death, their Lordships see no reason to doubt that any claim competent to him against the respondents had been cut off by prescription.

Whether the appellant has thereby been deprived of the right of action which, in the circumstances of this case, she would undoubtedly have had under sect. 1056 if he had died during the currency of the prescriptive period applicable to his right, depends upon the construction of the two sections of the Code which have just been referred to. The Code became law in the year 1866, and sect. 1056 superseded the provisions of cap. 78 of the Consolidated Statutes of the then Province of Canada (1859), which, though not identical in expression, were the same in substance with the enactments of the English statute, 9 and 10 Vict. In both statutes a right of action is given in general terms to the representative of the deceased on behalf of his widow and other relations entitled in all cases where an act or default is such as would, if death had not ensued, have entitled the party injured to maintain

1 Rev., 23rd July, 1892; L.R., 1892, App. Cas., 481; 67 L.T.R., 505.

an action. Their provisions leave indefinite some things which in the Code are defined. They leave to implication the conditions upon which the right is not to survive and by that omission favour the suggestion that what was intended to pass to the representative was such right of action as the deceased had at the time of his decease.

In England the statutory period of limitation applicable to such claims by injured persons is six years. The observations of English judges cited at the Bar, and noticed by Taschereau, J., did not refer to, and can hardly have contemplated a case in which that period had elapsed before the death of the injured person. The authorities from which they were taken merely establish that under the English Act, the representative can have no right of action first, where the act or default complained of raised no liability to the deceased at common law or by reason of his having contracted to bear the risk of it, and secondly, where the deceased has been compensated, or has settled and discharged his claim. These authorities can have no bearing upon the point raised for decision in this appeal, unless it can be shown that the provisions of the Code are in substance identical with those of the statute to which they have reference. In the course of the argument counsel for the parties brought somewhat fully under their Lordships' notice the law of reparation applicable to cases like the present, as it exist[illegible] enactment of the Code, and they discussed the question whether, and if so, how far, ch. 78 of the Statute of 1859 altered or superseded the rules of the old French law. These may be interesting topics, but they are foreign to the present case if the provisions of sect. 1056 apply to it and are in themselves intelligible and free from ambiguity. The language used by Lord Herschell, in *Bank of England* v. *Vagliano Brothers*[1] with reference to the Bills of Exchange Act, 1882 (45 and 46 Vict., ch. 61), has equal application to the Code of Lower Canada. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities." Their Lordships do not doubt that as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decision for the purpose of interpreting a statutory Code can only be justified upon some such special ground. In so far as they bear upon the present question, the terms of sect. 1056 appear to their Lordships to differ substantially from the provisions of Lord Campbell's Act and of the provincial statute of 1859. The Code ignores the representative of the injured person

1 64 L. T. Rep., 353; 1891, App. Cas., 107.

and gives a direct right of action to his widow and relations, a change calculated to suggest that these parties are to have an independent and not a representative right. A difference of much greater importance is to be found in the fact that the Code distinctly specifies certain conditions affecting the right of action competent to the deceased which are also to operate as a bar against any suit at the instance of his widow and his ascendant or descendant relations after his death. These conditions are not expressed in either of the statutes referred to, and, according to a well-known canon of construction it must be taken that they were inserted in the Code for the purpose of making it clear that no conditions affecting the personal claim of the deceased other than those specified are to stand in the way of the statutory right conferred upon his widow and relatives. The first paragraph of sect. 1056, read in its ordinary and natural sense, enacts that the widow and relations shall have a right to recover all damages occasioned by the death from the person liable for the offence or quasi-offence from which it resulted, provided they can show (1) that the deceased did not during his lifetime [illegible] indemnity or satisfaction for his injuries. Assuming, as [illegible] have found, that the death of Patrick Flynn, in November, 1883, was due to bodily injuries sustained in August, 1882 [illegible] the respondents were [illegible] the [illegible] requisite in order to give the appellant a right of action [illegible] to the letter. The prescription established by sect. 2262 (2) had cut off the deceased's right of action in August, 1883; but the Code does not make it a condition of the right of action given to the appellant by sect. 1056 that her husband's claim shall not have prescribed. That prescription is not within the meaning of the Code equivalent to indemnity or satisfaction is made perfectly [illegible] by a reference to sect. 1138, which enumerates the various [illegible] in which an obligation may be extinguished. The argument of the respondents if given effect to would practically add to the language of sect. 1056 words which are not to be found there, such as, and without his claim having been otherwise extinguished, or, in other words, involves the insertion of a new condition which the Legislature has excluded. It appears to their Lordships that when sects. 1056 and 2262 (2) are read together it becomes apparent that the deceased's claim, in respect of his bodily injuries, and the claim of his widow and relations in respect of his death were to run separate courses of prescription; and that their claim, which cannot emerge until his death occurs, was to be either directly or indirectly affected by the provisions of 2262 (2). The saving clause in that sub-section is only intelligible upon the footing that it was meant to treat the death as the foundation of their right of action: to apply to that right the rule of prescription introduced by sect. 1056, and to exempt it altogether from the operation of the prescriptive rule which limited the deceased's

claim. It may be noticed that the provisions of the second paragraph in sect. 1056 are inconsistent with the view that in order to give a claim to his widow and relations, the deceased must have had a good cause of action at the time of his death. These provisions plainly assume that on the death of a person dying from wounds received in a duel, his widow and relations would have a good action for all damages thereby occasioned against his antagonist, although he himself could have no right of action, their sole object being to extend liability to others who took part in the duel, whether as seconds of witnesses.

SUSPENSION.

CITY OF MONTREAL V. CANTIN.[1]

6. The contestation of a right before the courts does not suspend prescription. And the principle *contra non valentem agere non currit prescriptio* applies only to absolute impossibility and not to inconvenience, risk or probable obstacle.

7. The prescription runs from the existence of a right and not from the expiration of the delay granted by law to contest that right.

8. Under sect. 231 of the City of Montreal Charter, 1889, (52 Vict., ch. 79), the amount of an assessment becomes due and recoverable on the filing of the roll of assessment in the office of the city treasurer.

9. In an action by the city to recover after the period of prescription enacted by sect. 120, calculated from the date of filing, had elapsed, it appeared that the respondent's predecessor had been a party to proceedings and for its annulment:—

10. The Judicial Committee held, (1) that the period was not interrupted thereby within the meaning of art. 2227 of the Civil Code, for there had been no acknowledgment of liability;

11. That there had been no impossibility to sue within the meaning of art. 2232, for the right of action was not by the above Act suspended during such proceedings;

12. That the debt in suit was not dependent on a condition within the meaning of art. 2236; though sect. 144 of

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1 Supr. C., Canada, Quebec, aff., 14th March, 1906, L. R., 1906, App. Cas., 241; 94 L. T. R., 357; 22 T. L. Rep., 364; 75 L. J. Rep., n.s., 41; 12 R. L., n.s., 130.

the Act limited the time within which the roll might be annulled, it did not make the date of its coming into force conditional on the roll not being either attacked or annulled.

LORD DAVEY, page 245:—The case of the appellant was argued before their Lordships on three grounds: (1) That there was an absolute impossibility to act within the meaning of article 2232 of the Civil Code during the pendency of the contestation, or, in other words, the right of action was suspended during that period; (2) that the petition for annulment was in itself an acknowledgment by the debtor of the right of the person against whom the prescription ran, within the meaning of article 2227 of the Civil Code, and the prescription was thereby "interrupted"; (3) that the debt was one depending on a condition within the meaning of article 2236 of the Code, and the prescription did not run until such condition happened.

The Quebec Code incorporates in article 2232 the well-known maxim "*Contra non valentem agere non currit prescriptio.*" A decision of the French Court of Cassation was cited from Dalloz, that prescription did not run against a purchaser for the price of the thing purchased during the pendency of a suit to reduce the contract of sale; and another decision of the same court, was cited by the respondents to the contrary effect. The decisions of the Court of Cassation are, no doubt, entitled to great respect, but they are not binding authorities upon other courts, even in their own country. And their Lordships think that this case must be decided, not on conflicting decisions of a French court, however eminent, but on consideration of the enactments in the appellant's Act or charter. The terms of sect. 231 are clear and unambiguous. The amount of the assessments became due and recoverable on the filing of the roll of assessment, and there is nothing in the Act which in terms suspends the right of action during the pendency of a contestation, which by sect. 144, may be brought within six months after the passing of the assessment roll. Nor is there any obvious inconsistency in the co-existence of the right of action with the proceedings for annulment. In fact, sect. 241 contemplates that payments may be validly made and received at any time before the roll is annulled and set aside, and enacts that such payments will not even in that event become returnable by the city, but may be retained and applied in or towards amounts to be fixed as new assessment roll. And, looking at the elaborate provisions for securing publicity and opportunity for persons liable to be assessed to make objections before the final settlement of the roll contained in the earlier sections, it may well be that it was the deliberate intention of the Legislature that the amounts should be at once payable, whether there was a contestation or not. It is argued that there was an absolute impossibility in the law for

the city to act, because any seizure or action brought by it would or might, have been stayed by injunction pending the proceedings in contestation. It is probable that the court, in exercise of its discretion, and with a view to the orderly administration of justice, would have granted such an injunction. There would then have been a real impossibility to act, but the city would have secured the benefit of its having commenced its proceeding within the prescribed delay. Or the court might have required the respondents to submit to judgment for the amount sued for, or have imposed such other terms as circumstances might require for the protection of the city from being prejudiced by the delay in payment. It was then argued that any action by the city to recover an assessment might have been met by a plea of *lis pendens*. Their Lordships think that argument is based on a misunderstanding. The validity of the assessment could not have been tried or decided in an action by the city to recover the amount of an assessment. If the respondents relied as a defence on the invalidity of the assessment roll, their proper and only course would have been to have raised it by a cross-action or some proceeding in the nature of a counter-claim. The action of the city and the contestation of the respondents would, in fact, have stood to each other in the relation of action and cross-action and not that of two actions raising the same issue. The plea of *lis alibi pendens* would not therefore be maintainable. Their Lordships are of opinion that the city's right of action was not suspended during the pendency of the contestation.

In support of the second point the appellant argued that the contestation was an acknowledgment of the appellant's right, and (it is assumed) a continuous acknowledgment until the contestation was finally disposed of. The petition for annulment avers that the roll of assessment is "nul et de nul effet et doit être mis de côté," for the reasons there given, and the eighth reason ends with the conclusion that the contestants find themselves taxed "sans cause ni raison, sans considération licite et pour une cause illégale." An acknowledgment of right which will interrupt a prescription must be something amounting to an admission of liability, and the averments in the petition, to most people, would look more like a denial and repudiation of liability.

Lastly, it was said that the debt was one depending on a condition. This argument was based on sect. 144 of the Act, which provides, that after the delay of six months from the passing of the assessment it shall be considered valid and binding for all purposes whatsoever, provided that the subject matter thereof be within the competence of the corporation. The appellant construe this as meaning that the assessment shall not be, or the amount recoverable until after such delay, and the condition which he imports into the obligation is to this effect, viz., "If the assessment shall not be attacked within six months, or, if being attacked,

it shall be found valid." Their Lordships think that this contention is at variance with the plain provisions of sects. 231 and 241 already quoted. And they hold with Killam, J., that the only effect of sect. 144 is to fix a time within which an assessment may be attacked, and make it unassailable after the expiration of that time. It has nothing to do with the date on which the assessment comes into force.

TITLE.

LABRADOR COMPANY v. THE QUEEN.[1]

13. In an action of ejectment by the Crown it appeared that the appellant company derived title through a grant made in 1661 by the French Government, which gave no seigneurie over the land in suit, but only a right to make establishments for hunting and fishing within certain limits, that an ordonance in 1733, together with the action of the French Government thereunder, did not create or recognize any titles in the heirs of the grantee to such seigniory, that down in 1854 there was no evidence of either its creation or recognition by the British Crown, but that in 1854 the Canadian Act. Vict., ch. 3 (amended by subsequent Acts), recognized that there was a seigniory of Mingan, being part of the disputed land, the boundaries thereof were conclusively established by a schedule authorized by the Acts.

14. It was held that the High Court was right in dismissing the suit as regards the scheduled lands. If a mistake had been made, the Legislature alone could correct it, a court of law must give effect to the enactment as it stands:

15. It was held further, with regard to the claim of the company to hold the whole of the land in suit by prescription and immemorial possession, that, inasmuch as it has disclosed the true rule of its title, the law of prescription did not apply.

LORD HANNEN, page 122:—With regard to the claim of the company to hold by prescription and memorable possession, it is unnecessary to consider what would have been the effect of the evidence if the title of the company had rested upon this basis alone, because as the true root of their title has been shewn by the company themselves, there is no room for the application of the law of prescription. This is clearly stated by many authors of authority. "On ne peut pas prescrire contre son titre en ce

1 Quebec, aff., 19th November, 1892, L. R., 1893, App. Cas., 104; 67 L. T. R., 730.

sens que l'on ne peut pas se changer à soi-même la cause et le principe de sa possession, il suit de là que lorsque le titre est représenté, c'est par lui qu'il faut régler la cause et le principe de la possession; et tant que le possesseur ne trouve pas une intervention légale, soit par le fait d'un tiers, soit par une contradiction formelle, le titre reste la loi invincible qui sert à qualifier sa possession. Il y est ramené sans cesse par la loi et par la raison. C'est ce que les praticiens ont voulu exprimer par ce brocard: *ad primordium tituli posterior semper refertur eventus.—Troplong, de la Prescription, 522, 4th ed.*

PRINCIPAL AND AGENT.

CONSTRUCTION OF POWER OF ATTORNEY.

BANQUE D'HOCHELAGA v. JODOIN.[1]

1. Where by a document indorsed "procuration générale et spéciale," a wife being sole owner, constituted her husband "son procureur général et spécial" to administer her affairs, specifying such acts as drawing bills of exchange and making promissory notes:—

2. Held that the wife's liability extended to all promissory notes granted by her husband, and was not limited by art. 181 of the Civil Code to such notes as were required for purposes of the administration.

LORD HOBHOUSE, page 615:—The main argument offered in support of this view is that the power of attorney does not authorize the making of promissory notes. It is said to be a general power, and, therefore, by article 181 of the Civil Code, restricted to notes required for purposes of administration. No doubt the power is general, but it is also special, not only in name, but because it specifies a number of particular acts, among which are the transaction of business with banks, drawing bills of exchange, and making promissory notes. Mr. Fullarton produced no authority to shew that in an instrument so framed each particular act must be limited to an act of administration, because the whole series is ushered in by a grant of general power to conduct and manage property and affairs, nor does such a limitation seem reasonable. Their Lordships hold that the wife, being as between her and her husband sole owner of the property, gave him full power to make promissory notes in her name. They cannot see why the bank should not trust to this power, or why it should

1 Quebec, rev., 27th July, 1895. L. R., 1895. App. Cas., 612; 64 L. J. R., n.s., 174.

make inquiry as to the particular state of the wife's affairs which called for an advance of money. The whole affair was the wife's affair.

DISCHARGE BY PAYMENT.

COMMERCIAL BANK OF AUSTRALIA v. OFFICIAL ASSIGNEE OF WILSON & CO.[1]

3. W. with others, had become guarantors to the appellant bank for the discharge of a debt due to the bank. The bank afterwards agreed with three of the co-sureties that in lieu of their personal liability to pay the whole sum guaranteed in case of default of the principal debtor, they should deposit with the bank a sum of money less than the whole amount to be placed to a suspense account and amount to be appropriated to the payment of the principal debt at the discretion of the bank. No such appropriation had, in fact, been made before such commencement of this action.

4. It was held that this agreement did not amount to a payment of a part of the principal debt, and that the bank was entitled to prove for the whole sum against the estate of W., who had become bankrupt.

DUTY OF AGENT.

COMMONWEALTH PORTLAND CEMENT CO. v. WEBER ET AL.[2]

5. An agent is bound to take reasonable care in doing what he undertakes to do, but is not bound to meet consequences which are not contemplated in the contract, and the probability of which is as well known to his principal as to himself.

6. The respondents undertook to lighter and load machinery of the appellants at fixed charges, and to pass the goods through the Custom House without extra payment. It was common knowledge that duties were about to be imposed on imported machinery, and the respondents might have cleared the goods in time to escape the taxation. They did not do so, however, although the goods were cleared within the time prescribed by the Customs regulations.

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1 New South Wales, rev., 24th February, 1893, 68 L. T. R., 540; 62 L. J. R., n.s., 61.

2 New South Wales, aff., 19th December, 1904, 74 L. J. R., n.s., 25; 53 W. Rep., 337.

7. It was held that the respondents were under no legal obligations to anticipate the action of the Government, and were not liable to the appellants for the duty paid, and that the judge at the trial was right in withdrawing the case from the jury and entering a non-suit.

LORD LINDLEY, page 27:—There is no doubt that all agents are bound to take reasonable care in doing what they have undertaken to do; but it appears to their Lordships that the appellants cannot succeed unless they can shew that it was the duty of the respondents to attend to taxation by the Government and to take reasonable care to protect the appellants' goods from taxation. Their Lordships are of opinion that the contract between the parties did not impose upon the respondents any legal obligation to pay attention to what the Government might or might not do as regards altering Customs duties; and that there was no evidence to go to the jury of any breach by the respondents of any duty which they owed to their employers.

POWERS OF AGENT.

BRYANT ET AL. V. LA BANQUE DU PEUPLE ET AL.[1]

8. An agent who is authorized by his powers to make contracts of sale and purchase charter vessels and employ servants, and as incidental thereto, to do certain specified acts, including indorsement of bills and other acts for the purposes therein aforesaid, but not including the borrowing of money, cannot borrow on behalf of his principal or bind him by contract of loan, such acts not being necessary for the declared purposes of the power.

9. Where an agent accepts or indorses "per pro," the taker of a bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority where an agent, as such authority, his abuse of it does not affect a *bonâ fide* holder for value.

10. Powers of attorney must be construed strictly, and if a question is raised as to the authority conferred by the power, it must be shown that on a fair construction of the whole instrument the authority in question is conferred in express terms, or by necessary implication.

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1 Quebec, 4th March, 1893, L. R., 1893, App. Cas., 170; 68 L. T. R., 546; 61 L. J. R., n.s., 68; 41 W. Rep., 600; 8 T. L. Rep., 322.

11. There is no difference in this respect between the law of Canada and the law of England.

LORD MACNAGHTEN, page 177:—On the appeal before this Board the learned counsel for the appellants did not seriously dispute the proposition that the words *per pro* in the acceptance or the indorsement of a bill of exchange or promissory note amount to an express statement that the party so accepting or indorsing the bill or note has only a special and limited authority, and, therefore, that a person who takes a bill or note so accepted or indorsed is bound at his peril to inquire into the extent of the agent's authority, *Stagg* v. *Elliot*.[1] Nor was it disputed that powers of attorney are to be constructed strictly, that is to say, that where an act purporting to be done under a power of attorney, is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary complication. It was pointed out, indeed, that the decisions on which the learned counsel for the appellant mainly relied in support of these propositions were decisions of English judges, but it was not shewn that there is any difference in these respects between the law of Canada and the law of England. The provisions of the Civil Code of Lower Canada and the Canadian authorities which were cited to their Lordships appear to be in harmony with English law and English authorities.

Page 180:—The law appears to their Lordships to be very well stated in the Court of Appeal of the *State of New York in President, etc., of the Westfield Bank* v. *Cornen*,[2] cited by Andrews, J., in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows:

"Whenever the very act of the agent is authorized by the terms of the powers, that is, whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such acts is binding on the constituent as to all persons dealing in good faith with the agent, such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority."

FORMAN & CO. v. THE SHIP "LIDDESDALE."[3]

12. Where the plaintiffs contracted with the agent of an absent shipowner to effect certain specified repairs (all confined to damage by stranding), and instead of doing the work

1 12 C.R., n.s., 373-81.
2 37 N.Y.R., 10 Tiff., 322.
3 Victoria, aff., 17th February, 1900, L. R., 1900. App. Cas., 190.

as stipulated alleged that they had, on the agent's authority, done the equivalent thereto or better, and in the same contract stipulated that they should be paid for repairs due to deterioration at scheduled prices stated by them.

13. It appeared that the agent's authority to their knowledge was limited to the said specified repairs, they could not recover on the contract, which was an entire one, and in its entirety had never been performed.

14. And the shipowners having taken the ship as repaired and sold it, did not thereby ratify the contract.

Lord Hobhouse, page 202:—In the case of *Appleby* v. *Myers*,[1] Lord Blackburn mentions two conditions under which a contractor, for a lump sum, who has not performed the stipulated work, can recover something under his contract. He can do so if he has been prevented by the defendant from performing his work, or if a new contract has been made that he shall be paid for the work he has actually done.

Fleming v. Bank of New Zealand.[2]

15. The plaintiff's agent obtained from the defendant bank a promise to pay certain cheques drawn by the plaintiff in consideration of his depositing with it a store warrant in lieu of the cash which the plaintiff had instructed him to pay to the credit of the plaintiff's account. The store warrant belonging to the plaintiff, was under pledge to the agent, and was accepted by the bank with full knowledge of the circumstances.

16. It was decided, in an action for dishonouring the cheques, that the agent in substituting the deposit for cash did not exceed his authority, but that even if he had, the contract was complete, for there was consideration for the bank's promise. The deposit conferred on the bank some right, interest, profit, or benefit within the legal meaning of consideration; and in the circumstances it could not be heard to say that that consideration did not move for the plaintiff.

17. That evidence of special damage—that is, of plaintiff's loss of custom and credit from particular individuals, was wrongly admitted; special damage not having been alleged.

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1 L. R., 2 C. P., 651.

2 New Zealand, rev., 27th June, 1900, L. R., 1900, App. Cas., 577; 16 T. L. Rep., 469.

LORD LINDLEY, page 586:—The doctrine that a consideration for a promise must move from the promise laid down in text-books *e.g.*, in Leake, in his *Digest of the Law of Contracts*,[1] and hold goods in ordinary cases where a promise is made to one man for the benefit of another. But the authorities for the doctrine do not cover a case like the present, in which the consideration is supplied by an agent who obtains the promise for and on behalf of his principal.

REVOCATION. FRITH v. FRITH.[2]

18. Where a power of attorney was given by the owners of an estate to an agent to enter into possession and to manage the estate, to receive the rents and profits and to pay the debts of the owners, and possession was taken by the agent, and some time afterwards the power of attorney revoked and possession demanded.

19. The power of attorney was revocable, although the agent had, with the consent of one of the owners, given a personal guarantee to the mortgagee of the estate to pay the mortgage debt on the day of redemption, and (even if the authority were irrevocable) the owners were entitled to recover possession of the property.

LORD ATKINSON, page 619:—In reference to the second point, it cannot be disputed that the general rule is that employment of the general character of the appellant in this case can be terminated at the will of the employer. The proper conduct of the affairs of life necessitates that this should be so. The exception to this rule within which the appellant must bring himself, if he is to succeed, is that where "an agreement is entered into for sufficient consideration, and either forms part of a security, or is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable." *Story on Agency, page 476.*

It cannot be contended that the ordinary case of an agent or manager employed for pecuniary reward in the shape of a fixed salary comes within this exception, though his employment confers a benefit upon him. And their Lordships are of opinion that the position of the appellant under the instruments appointing him attorney over this estate is in law that of an ordinary agent or manager employed at a salary, and nothing more, because the authority which was conferred upon him contains no reference to the special interest in the occupation of his post which his

1 pp. 611 and 612.
2 Supr. C., Cralcis Islands, 21st March, 1906, 54 Weekly Reporter, 618; 75 L. J., P. C., n.s., 50.

guarantee to Astwood might have given him, was not expressed or intended to be used for the purpose of subserving that interest, and has no connection with it. For these reasons their Lordships think the authority given to the appellant was revocable. Several cases have been cited by the appellant's counsel in support of his second intention. On an examination of them it will be found that the essential distinction between this case and those cited in this, that in each of the latter power and authority were given to a particular individual to do a particular thing, the doing of which conferred a benefit upon him, the authority ceasing when the benefit was reaped, while in this case, as already pointed out, nothing of that kind was ever provided for or contemplated.

In *Carmichael's Case*,[1] the donor of the power, for valuable consideration, conferred upon the donee authority to do a particular thing, in which the latter had an interest, namely, to apply for the shares of the company which the donee was promoting for the purpose of purchasing his own property for him, and the donor sought to revoke that authority before the benefit was reaped. In *Spooner* v. *Sandilands*,[2] the donor charged his lands with certain debts due and to accrue due to the donees, and put the latter into the possession of those lands and into receipt of the rents and profits of them, for the express purpose of enabling the donees to discharge thereout these same debts: and it was sought to eject the donees before their debts were paid. In *Clerk* v. *Laurie*,[3] a wife pledged to a bank dividends to which she was entitled, to secure advances made to her husband. It was held that while the advances remained unpaid she could not revoke the bank's authority to receive the dividends. In *Smart* v. *Sandars*,[4] it was decided that the general authority of a factor in whose hands goods were placed for sale, to sell at the best price which could reasonably be obtained, could not be revoked after the factor had made advances on the security of the goods to the owner of them, and while these advances remained unpaid. It is not necessary for the purposes of these appeals that their Lordships should determine whether or not the appellant has, on the authority of *Read* v. *Anderson*,[5] and *Turner* v. *Goldsmith*,[6] a right of action against the respondent for damages for breach of agreement. However that may be, it is clear, their Lordships think, that even if the authority conferred upon the appellant had been irrevocable, he has not a good equitable defence to the action of ejectment, inasmuch as the contract made with him, being one entire thing incapable of being divided into independent parts, he would not, upon the authorities cited, be entitled to an in-

1 1896, 2 Ch., 643.
2 2 Y. and C., 390
3 5 W. R., 629; 2 H and N., 199.
4 5 C. B., 895.
5 32 W. R., 950, L. R.; 13 Q B. D., 779.
6 32 W. R., 574. 1891; 1 Q. B., 544.

junction to restrain the respondent from suing in ejectment. That is, as the appellant's counsel admits, the test. A suit for such an injunction would, in this case, amount in effect to a suit for specific performance of a contract for hiring and service, a suit which cannot be maintained. In *Ogden* v. *Fossick*,[1] the suit was instituted for specific performance of an agreement to grant a lease of a coal wharf. The agreement contained a provision that the plaintiff should, during the term, be appointed manager of the coal wharf at a specified salary. It was held by the Lords Justices that the two parts of the agreement were inseparably connected, and as a decree for specific performance of the contract for personal service could not be granted, the suit must be dismissed. In *Stocker* v. *Brokelland*,[2] the plaintiff, who was entitled to certain letters patent, by deed granted to the defendant for a money consideration an exclusive license to use the patent, and by the same deed covenanted with the plaintiff that he (the plaintiff) should act as manager of the defendant's works for the same period. The plaintiff was dismissed. He thereupon filed a bill claiming to be a partner in the business, and praying that the defendant might be restrained from excluding him from the works. In delivering judgment the Lord Chancellor (Lord Truro) said:

"I therefore am clearly of opinion that there was no partnership, that it was simply a contract of hiring and of service, the remuneration to be measured with reference to the amount of the profits of the business. If that be so, is there any instance where it has been supposed that a contract of hiring and service could be made the subject of an application to this court if the employer claimed to dismiss his servant, or his manager, or by whatever name the party to perform the service is to be denominated. I do not recollect any instance of any attempt on the part of a court of equity to compel the employer to retain the servant, agent, or manager, and not to forbear to leave him to his remedy at law for the breach of it."

Their Lordships are accordingly of opinion that the appellant's third contention, like his second, cannot be sustained, and that the appellant is not entitled to withhold from the executrix the possession of the lands which he obtained as her and her son's attorney or agent.

SALE TO AGENT. LIVINGSTONE v. CROSS.[3]

20. Where a vendor has employed an agent to find substantial persons to purchase a property within a limited time upon specified terms, such agent to be paid by a commission on the

1 4 De G., F. and J., 426
2 120 L. J. Ch. 401
3 Quebec, aff., 16th February, 1901, 85 L. T. R., 382.

purchase money after the completion of the sale, the agent cannot insist upon a conveyance to himself as purchaser.

PRINCIPAL AND SURETY.

RELEASE OF CO-SURETY.

MERCANTILE BANK v. SYDNEY v. TAYLOR.[1]

1. In a suit against one of five joint and several sureties to recover the amount guaranteed, it appeared that the plaintiff had without the defendant's knowledge and consent, released another of the sureties for all debts due by him at the bank at this date.

2. It was held, that the plaintiff could not recover and that the legal effect of the release could not be modified by evidence of verbal negotiations prior to the release for the purpose of shewing an agreement to reserve rights against the sureties.

RELEASE OF PRINCIPAL.

COMMERCIAL BANK OF TASMANIA v. JONES.[2]

3. Where a creditor released his principal debtor and accepted a third party as full debtor in his stead, and his surety for the former debtor agreed to give a guarantee for the latter and to continue his former guarantee until he did so, and then died without having given it:

4. Held, in an action by the creditor against his executors, that the former debt having been extinguished by the release, the remedy against the deceased was gone.

5. Novation of debt operate as a complete release of the original debtor and cannot be construed as a mere covenant not to sue him.

PRIVILEGE.

BUILDERS' PRIVILEGE.

LA BANQUE D'HOCHELAGA v. STEVENSON.[3]

1. Under the Civil Code, as amended by 59 Victoria, ch. 42, a builder's privilege is limited to one year from the date of

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1 New South Wales, 13th May, 1893, L. R., 1893, App. Cas., 317; 8 T. L. Rep., 463.

2 Tasmania, 13th May, 1893, L. R., 1893, App. Cas., 313; 62 L. J. R., n.s., 104; 8 T. L. Rep., 466.

3 Quebec, aff., 28th July, 1899, L. R., 1900, App. Cas., 600; 83 L. T. R., 235; 69 L. J. R., n.s., 139.

registration thereof; and, with regard to an hypothecary privilege conferred on suppliers of materials, it only arises on notice being given to the proprietor under article 2013 g, an registered under article 2103, and lapses unless the prescrite. legal proceedings are taken within three months from the date of notice.

LORD MACNAGHTEN, page 603:—Their Lordships entirely concur in the judgment of the Court of King's Bench, delivered by Lacoste, C.J., who adopted the reasoning of the Superior Court. The original claim was founded on the articles of the Civil Code, as amended by 57 Vict., ch. 46. That statute, which came into force in March, 1894, gave a right of preference to the supplier of materials as well as to the builder, and conferred a privilege for two years from the date of registration. It was, however, repealed by 59 Vict., ch. 42, which came into force on the 21st February, 1896. The latter statute omitted suppliers of materials from the list of privileged creditors, and reduced the builder's privilege to the period of one year from the date of registration, but it gave the supplier of materials, on compliance of certain formalities, an hypothecary privilege. In the present case, the work was done and the materials supplied while the Act of 57 Vict. was in force. But the required memorial or bordereau was not registered until the 16th March, 1896, and it is to be observed that the amount mentioned in the memorial was a lump sum. The memorial does not distinguish between the amount due for work done and the amount due for the materials supplied. The bank claims that, inasmuch as the work was done and the materials supplied while the earlier Act was in force, the privilege must be deemed to last for two years. But obviously this is not the case. When the memorial was registered, the only articles under which registration could be effected were the articles of the Code as amended by the Act of 59 Vict. Registration under those articles confers a privilege, but a privilege limited to one year from the date of registration. The claim to an hypothecary privilege under the Act 59 Vict. seems to be equally without foundation. It is not alleged that the claimants did, in fact, comply with the formalities required by the articles of the Civil Code as amended by the Act 59 Vict. They seek to rely upon an admission made in the course of the proceedings to the effect that all the formalities required were complied with. But this admission was made when the only question between the parties was as to the duration of the builder's privilege. No claim to an hypothecary privilege had been advanced at that time.

In the next place they say that it was impossible for them to comply with the prescribed formalities, because the materials were supplied directly to the proprietor. Whatever the reason

for non-compliance may have been, article 2013 l, introduced by the Act 59 Vict., makes it perfectly clear that the hypothecary privilege conferred on suppliers of materials only arises on notice being given to the proprietor, in virtue of article 2013 g, and registered according to article 2103. It lapses unless the prescribed legal proceedings are taken within three months from the date of the notice.

CROWN.

LIQUIDATORS OF THE MARITIME BANK OF CANADA v. RECEIVER-GENERAL OF NEW BRUNSWICK.[1]

2. The British North America Act, 1867, has not severed the connection between the Crown and the provinces; the relation between them is the same as that which subsists between the Crown and the Dominion in respect of the power, executive and legislative, public property and revenues, as are vested in them respectively. In particular, all property and revenues reserved to the provinces by sects. 109 and 126 are vested in Her Majesty as sovereign head of each province.

3. Held that the Provincial Government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada in respect of public moneys of the Province, deposited in the name of the Receiver-General of the Province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which prerogative attaches.

CASES CITED BY LORD WATSON:—*Exchange Bank of Canada* v. *The Queen.*[2] *Reg.* v. *Bank of Nova Scotia.*[3] *Hodge* v. *The Queen.*[4] *Attorney-General of Ontario* v. *Mercer.*[5] *St. Catherine Milling & Lumber Co.* v. *The Queen.*[6] *The Attorney-General of British Columbia* v. *Attorney-General of Canada.*[7]

YOUNG v. STEAMSHIP "SCOTIA."[8]

4. A vessel which is the property of a Colonial Government, although built to be used as a ferry boat for the purpose of

1 New Brunswick, aff., 2nd July, 1892, L. R., 1892, App. Cas., 237.
2 11 App. Cas., 153.
3 11 Supr. C. R., 1.
4 9 App. Cas., 117.
5 8 App. Cas., 767.
6 14 App. Cas., 46.
7 14 App. Cas., 295.
8 Newfoundland, aff., 16th July, 1903, 89 L. T. R., 374; 72 L. J. R., n.s., 115.

carrying passengers and merchandise for hire between one part of a railway owned by the Government and another, enjoys the same immunity from arrest as the property of the Crown, and is not liable to an action for salvage.

NEW SOUTH WALES TAXATION COMMISSIONERS v. PALMER.[1]

5. In the administration of a bankrupt's estate under the New South Wales Bankruptcy Act, 1898, the Crown is entitled to preferential payment over all other creditors.

LORD MACNAGHTEN, page 181:—In *Rex* v. *Wells*,[2] in a passage which has been often cited, Macdonald, C.B., says (2): "I take it to be an incontrovertible rule of law that where the King's and the subject's title concur, the King's shall be preferred." Except so far as the Legislature has thought fit to interfere, the rule is one of universal application, and, perhaps, not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community. The rule is enunciated by Lord Coke in *Quick's Case*.[3] From Lord Coke's time to the present day it has never been questioned as a rule of law, and, so far as their Lordships are aware, there has never been any attempt on the part of any court to limit the generality of its application, except in the present case, and in two recent cases in the Colonies, which will be referred to presently.

Page 183:—It can hardly be disputed that in the present case the rights of the Crown and the rights of ordinary creditors or "common persons" (as the phrase is in the old cases) do concur or come into competition. It is admitted that the Bankrupcy Act, 1898, does not bind the Crown. It would therefore seem, on principle, that in the administration of the assets under the direction of the court it was the duty of the court to give effect to the Crown's prerogative.

As regards authority, both in England and Ireland, the highest courts of the country, short of the House of Lords, have upheld the prerogative of the Crown. The judgment of the Court of Appeal in *In re Henley & Co.*,[4] seems to their Lordships, as it did to Simpson, J., to be clear upon the point. The decision was rested upon two separate grounds and upon two distinct prerogatives. It was a case of winding up, not of bankruptcy. The property had not passed out of the company. The court, therefore,

1 New South Wales, rev., 8th February, 1907, L. R., 1907, App. Cas., 179; 23 T. L. R., 304.
2 Ibid., 282.
3 9 Rep., 129b.
4 9 Ch. D, 469.

held that the Crown was still at liberty to pursue its extreme rights against the company's property and was on that ground entitled to priority. But the court also held that under the other and wider prerogative the claim of the Crown must prevail. "If the matter," said James, L.J.,[1] is treated as a matter solely of administration of assets under the direction of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails. Whether, therefore, the debt is treated as a debt of record or of specialty, or of simple contract, there being a right of priority in the Crown, it is right that the debt should be paid." The other members of the court, Brett and Cotton 1, J.J., also rested their decisions on both grounds separately. The reasons of the Lords Justices, founded on the wider prerogative, is inapplicable to a case where the narrower prerogative is no longer capable of being exercised, though the assets are still under the direction of the court vested in a public officer who has no beneficial interest in them. Of course, if that view be correct, the observations in *Henley's Case*,[2] to which Simpson, J., deferred, were wholly idle and irrelevant. But it is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined. It is equally impossible to suppose that the very learned judges who formed the court, and who were beyond all others familiar with the law of bankruptcy, pronounced a judgment apparently unqualified and unrestricted in its application, yet "with the tacit exception of administration in bankruptcy," as suggested by Griffith, C.J., in the case of *In re Baynes*.[3]

The judgment of the Court of Appeal in Ireland in *In re Galvin*,[4] was a case in bankruptcy, and it is to the same effect. The court there was composed of Ashbourne, L.C., Palles, C.B., and FitzGibbon and Walker L.J.J., and the judgment of the court was delivered by the Chief Baron, one of the most learned and accurate judges on the Bench.

It is difficult to understand the suggestion made in the court below that, because the Crown puts forwards its claim to priority in the case of the administration of a bankrupt's estate, it must, therefore, be held to have abandoned an undoubted prerogative on which it is actually at the time insisting, and to have elected to come in with the ordinary creditors.

The attention of their Lordships was called to the case of *In re Baynes*,[5] which has already been mentioned, and a case in Ontario,

1 9 Ch. D., 481.
2 9 Ch. D., 481.
3 9 Ch. D., 469.
4 9 Queensland, L. J., 33, 44, Rep. 202
5 1897, 1 I. R., 523.

Clearkson v. *Attorney-General of Canada*,[1] in both of which the right of the Crown to preferential payment out of assets being administered in bankruptcy was denied. Their Lordships have carefully considered those cases. With every respect to the courts by which they were decided, their Lordships cannot help thinking that in both cases the learned judges have not sufficiently kept distinct the two prerogatives which formed separate grounds of decision in *In re Henley & Co.*[2] The judgments are devoted in a great measure to a consideration of the prerogative under which the Crown was entitled to peculiar remedies against the debtor and his property, and of the law and the authorities bearing upon it. The principle upon which that prerogative depends is not to be confounded with the principle invoked in the present case. The prerogative, the benefit of which the Crown is now claiming, depends, as explained by Macdonald, C.B., in *The King* v. *Wells*,[3] upon a principle "perfectly distinct..... and far more general, determining a preference in favour of the Crown in all cases, and touching all rights of what kind soever where the Crown's and the subject's right concur and so come into competition."

LESSOR'S PRIVILEGE IN CASE OF INSOLVENCY.

ROSS v. BEAUDRY ET AL.[4]

6. Where insolvent tenants judicially abandoned their property for the benefit of their creditors, and statute law (61 Vict., ch. 46) at the date of the abandonment restricted the lessor's preference to two years' rent, ranking them as ordinary creditors for the balance, while no such restriction was enacted by the law as it stood at the date of the leases:

7. It was held, that the existing statute applied to all liquidations which arose after its enactment, and governed the lessor's privilege unless expressly excepted therefrom.

LORD ROBERTSON, page 573:—The sole question being whether the rights of the respondents are measured by the statute law as it stood when the leases were granted, or as it stood when the insolvent tenants abandoned their property, it is convenient to set out the two contrasted enactments. At the date of the leases article 2005 of the Code was as follows:—

"2005. The privilege of the lessor extends to all rent that is due or to become due, under a lease in authentic form.

1 15 Ont. Rep., 632; 16 Ont. App. Cas., 1907.
2 9 Ch. D., 469.
3 16 East, 278.
4 Quebec, 2nd August, 1905, L. R., 1905, App. Cas., 570; 93 L. T. R., 315; 74 L. J. R., n.s., 106; 21 T. L. Rep., 735; 12 R. L. n.s., 173.

"But in the case of the liquidation of property abandoned by an insolvent trader who has made an abandonment in favour of his creditors, the lessor's privilege is restricted to the whole of the rent due and to become due during the current year, if there remain less than four months to complete the year, to the whole of the rent due and to the rent becoming due during the current year and the whole of the following year.

"If the lease be not in authentic form, the privilege can only be claimed for three overdue instalments and for the remainder of the current year."

The same article, as amended by 61 Vict., ch. 46, now reads as follows:

"2005. The privilege of the lessor extends to all rent that is due or to become due under a lease in authentic form.

"But in the case of the liquidation of property abandoned by an insolvent trader who has made an abandonment in favour of his creditors, the lessor's privilege is restricted to twelve months' rent due and to rent to become due during the current year, if there remain more than four months to complete the year; if there remain less than four months to complete the year, to the twelve months' rent due and to the rent of the current year and the whole of the following year.

"If the lease be not in authentic form, the privilege can only be claimed for three overdue instalments and for the remainder of the current year."

A comparison between the two enactments shews that the parties are right in saying that the soundness of the judgment now under review depends solely on the question which of the two forms of article 2005 is applicable to the case.

The decision of the Court of King's Bench purports to proceed on the well-established principle that legislation is presumed not to be retroactive in its effect or existing rights; and this principle is enforced and elucidated at length in the judgment. In applying this doctrine, however, the learned judges do not, as it appears to their Lordships, sufficiently advert to the question. To what subject-matter does the new paragraph in article 2005 primarily relate? The new enactment is directed to the regulation of the liquidation of traders' abandoned properties and the relations arising in liquidation between the lessor of properties and the general body of creditors. Accordingly, *primâ facie*, the true application of the doctrine against the retroaction of laws is to confine this particular enactment to liquidations arising after the amendment of the law. The question whether there shall be a further limitation of the enactment by excluding lessors' leases are dated prior to the amending Act stands in a very different position, and the intention of the Legislature must be derived,

as in every case, from the language and the subject-matter of the enactment. Now, it is to be observed that the right now insisted for by the landlord was derived not from the terms of the lease, but from the general law as expressed in the Code. In the earlier form of article 2005 (as it stood at the date of the leases) there was one regulation of the effect of abandonment by a trader on the relative position of creditors; in the new form of the article there is a different one. Now, it is extremely difficult to suppose that it was intended that what is expressed as a uniform rule for liquidation should be invaded by the varying exceptions which would result from the respondent's argument without express authority by the Legislature. All regulations about the ranking of creditors in liquidation necessarily affect existing rights, and some one or other of the competitors loses thereby. Accordingly, if in an enactment of this kind it were intended to exclude from its application persons in the position of the respondents, some specific enactment would be made. The circumstance that the change in the law is brought about in the form of an alteration in a Code which is supposed to express the existing and living law in its entirety does not, it is true, affect the principle applicable, but vividly illustrates the need of some express exception, where it is intended to protect in the future one class of rights from the mass affected by general words. Their Lordships do not think that the presumption against retroaction compels the conclusion that it is to be pursued through all the consequences of the main enactment, and they deem its true application in the present instance to be merely to limit article 2005 to abandonments occurring after it came into force.

See BANK AND BANKING: *Lien on shares*; AFFREIGHTMENT: *Lien for freight.*

PROBATE OF WILL.

See WILL: *Probate.*

PROMISSORY NOTES.

See BILLS OF EXCHANGE.

PROPERTY.

EXPROPRIATION.

COMMISSIONER OF PUBLIC WORKS v. LOGAN.[1]

1. The intention of authorizing the taking of private property without compensation cannot be attributed to a Legislature unless it be expressed in unequivocal terms; and if an

1 Cape of Good Hope, aff., 12th June, 1903, 72 L. J. R., n.s., 91.

enactment is in terms susceptible of two constructions—either that such power is reserved, or that powers already existing are simply transferred to a newly constituted body—the latter is the preferable construction.

IMMOVABLE BY DESTINATION.

REYNOLDS v. ASHBY.[1]

2. Machines were supplied by the owner of them to the lessee of a factory upon the hire-purchase system, the machines to remain the property of the owner till they had been wholly paid for; upon default in payment the owner to have power to determine the hiring and remove the machines. They were affixed, as the owner knew, to concrete beds in the floor of the factory by bolts and nuts, and could have been removed without injury to the building or the beds. The lessee made default in payment, and the owner brought an action to recover the machines or their value from a mortgagee of the premises who had taken possession:—

3. It was held that the machines had been so affixed as to pass by the mortgage to the mortgagee.

EARL OF HALSBURY, L.C., page 470:—There are various modes by which things, when they are trade fixtures, can be protected from being absorbed by the owner of the freehold or by a mortgagee, and I should hesitate very much before I agreed that such fixtures as are in question here and which could only be used when fixed, must necessarily belong to the freeholder or to the mortgagee. By an expressed or implied contract between the parties interested in such a transaction, machinery for the purpose of working in a factory might be protected so that an unpaid vendor who has lent on the hire system machinery to the person who wanted to use it in his mill, might make it safe from being absorbed either by creditor or landlord. There is nothing, however, here from which I can infer either an expressed or implied contract for the removal of these articles, which undoubtedly were fixed, and under these circumstances I do not dissent from the conclusion at which your Lordships have arrived.

LORD JAMES, page 471:—My Lords, the authorities controlling the questions respecting the difference between fixtures and chattels are very numerous, and have arisen between different parties. The rights of landlord and tenant, of mortgagor or mortgagee,

1 Aff., 5th August, 1904, L. R., 1904, App. Cas., 466.

and liability to being rated, have brought this question to a legal issue for the determination of our courts.

I do not propose to review these authorities in detail, but, having consulted and considered them, I have come to the conclusion that the weight of authority is in favour of the view that these machines must be held to be affixed to the building so as to pass under the mortgage as being a portion of the factory.

The cases supporting this view are very numerous, but the principal case now generally referred to is that of *Hobson* v. *Gorringe*,[1] the authority which Lawrence, J., acted upon. Doubtless there are cases and dicta upon which the appellants are entitled to rely. *Hellawell* v. *Eastwood*,[2] and several other cases were relied upon at the Bar to shew that these machines should be regarded as chattels—but in none of these cases does the question arise between mortgagor and mortgagee, and in some of them the decisions are explained upon grounds other than those existing in the present case.

In the same way *Trappes* v. *Harter*,[3] a case arising out of a mortgage, was decided principally upon a question of local custom, and in *Lyon* v. *London City and Midland Bank*,[4] the decision in favour of some chairs being chattels appears to have been correctly decided upon the special facts of that case.

LORD LINDLEY, page 473:—There is a long series of the highest authority shewing conclusively that as between a mortgagor and a mortgagee, machines, fixed as these were to land mortgaged, pass to the mortgagee as part of the land. The decisions in question begin with *Walmsley* v. *Milne*,[5] and include *Ex parte Barclay*,[6] *Mather* v. *Fraser*,[7] *Climie* v. *Wood*,[8] *Longbottom* v. *Berry*,[9] *Holland* v. *Hodgson*,[10] *Gough* v. *Wood*,[11] *Hobson* v. *Gorringe*.[12]

Others were referred to in the argument, but I need only mention *Southport and West Lancashire Banking Co.* v. *Thompson*,[13] where it was held that whether the mortgagor is an owner in fee or is only a leaseholder (as in this case) is immaterial with reference to the question now under consideration. My Lords, it is quite impossible to over-rule these decisions.

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1 1897, Ch., 182.
2 6 Ex., 295.
3 1833, 2 C. and M., 153.
4 1903, 2 K. B., 135.
5 1859, 7 C. B., n.s., 115.
6 1858, 5 D. M. and G., 403.
7 2 K. and J., 536.
8 L. R., 3 Ex., 257; L. R., 4 Ex., 328
9 1869, L. R., 5 Q. B., 123.
10 L. R., 7 C. P., 328.
11 1894, 1 Q. B., 713.
12 1897, 1 Ch., 182.
13 1887, 37 Ch. D., 64.

It must be conceded that there are dicta in other cases, and even decisions which show that for some purposes even machines, more or less like this, have been treated as chattels. There is *Hellawell* v. *Eastwood*,[1] a case of distress, which has been much commented on in the later cases, and is of questionable authority; there are rating cases, such as *Childley* v. *West Ham*,[2] and *Tyne Boiler Works* v. *Overseers of Longbenton*,[3] there is the case of the *Miners Huts, Wake*, v. *Hall*,[4] which arose between miners in the Peak District and landowners, and turned entirely on a local custom; there is the tapestry case, *Leigh* v. *Taylor*,[5] which arose between a tenant for life and a remainderman; there is *Fisher* v. *Dixon*,[6] which arose between the heir and executors of the deceased owner of the land, and the machinery fixed to it.

My Lords, I do not profess to be able to reconcile all the cases on the fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing, and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least, to the position of the rival claimants to the things in dispute. In this case, and still regarding the question for the present as concerning the mortgage on the one side and the mortgagee on the other, it is, in my opinion, impossible to hold that the machines did not pass with the mortgage. The only authorities on mortgages which present any difficulty are *Trappes* v. *Harter*,[7] and the very recent case of *Lyon & Co.* v. *London City and Midland Bank*.[8]

Trappes v. *Harter*[7] was a reputed ownership case, and turned on the facts stated in a special case. The court there held that some trade fixtures did not pass by a mortgage of the property to which they were attached. The special case, however, stated facts shewing that the machines as fixed were locally regarded as chattels, that the partners who put them up so regarded them, and that the mortgagee knew this and so treated them. This accounts for the decision.

In *Lyon & Co.* v. *London City and Midland Bank*,[8] some chairs were hired from the plaintiffs by the owner of a place of public entertainment at Brighton. The Brighton Town Council required the chairs to be fastened so as not to be easily displaced, and this was done. The chairs were screwed to bars [illegible] ed to

1 6 Ex., 295.
2 37 L. T., 486.
3 8 App. Cas., 195.
4 18 Q. B. D., 81.
5 1902, App. Cas., 157.
6 1845, 12 Cl. and F., 312; 69 R. R., 97.
7 2 C. and M., 153.
8 1903, 2 K. B., 135.

the floor. The building and fixtures were then mortgaged to the defendants. The mortgagees took possession and claimed the chairs, but the court held they did not form part of the property mortgaged, but remained so many chattels. Having regard to the nature of the things fixed, the mode of fixing and the order of the Town Council, the decision was, in my opinion, quite right and in accordance with the authorities referred to.

See RESPONSIBILITY: *Non-natural use of property.*

PUBLIC LANDS.

See CROWN LANDS.

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RAILWAY.

CONSTRUCTION OF RAILWAY ACT.

Toronto Railway Co. v. The Queen.[1]

1. Although there may be in Canadian Acts and for other purposes substantial distinctions between railways or railway tracks and street railways and tramways, yet, for the purpose

1 Canada, rev., 31st July, 1896, L. R., 1896, App. Cas., 551.

of separating free and dutiable articles, such distinction is not maintained in Canadian Act 50 and 51 Vict., c. 39, and its three predecessors.

2. According to the true construction of that Act (see s. 1, item 88, and s. 2, item 173), the question whether imported steel rails are taxed or free depends solely upon their weight, not upon the character of the railway track for which they are intended.

GRAND TRUNK RAILWAY CO. OF CANADA v. WASHINGTON.[1]

3. Under the true construction of the Railway Act (Canada) 51 Vict., c. 29, the power conferred by sub-section 4 of section 262 upon the Railway Committee of the Privy Council to exonerate a railway company during a specified portion of the year from the duty of filling certain spaces specified in sub-section 3: Such extension of power was not authorized by the grammatical construction of the sub-sections, nor rendered imperative by the context.

JUDICIAL SALE.

CENTRAL ONTARIO RAILWAY v. TRUSTS AND GUARANTEE COMPANY.[2]

4. A railway incorporated in 1873 by an Ontario statute, and declared by a Dominion statute in 1884 to be a work for the general advantage of Canada (thereupon becoming subject to the legislation of the Dominion), can in a suit by the trustees for bondholders to enforce a mortgage thereon, be sold by virtue of the provisions contained in Dominion Act 46 Vict., c. 24, ss. 14, 15 and 16, re-enacted by the Dominion Railway Act, 1888, *51 Vict., c. 29.*

LORD DAVEY, page 578:—The only question to be decided on this appeal is whether a railway, which is subject to the legislation of the Dominion, can be sold in a suit by the trustees for bondholders to enforce a mortgage on the railway company's railway, lands, and franchises. All the learned judges who have taken part

1 Supr. C., Canada, aff., 24th February, 1898, L. R., 1899, App. Cas., 275; 80 L. T. R., 301; 68 L. J. R., n.s., 37.

2 Ontario, aff., 4th August, 1905, L. R., 1905, App. Cas., 576; 93 L. T. R., 317; 74 L. J. R., n.s., 116; 21 T. L. Rep., 732.

in the decision in the Courts below have decided that it can, and the appeal is by the railway company against their decision.

Page 581.—In the well known case of *Gardner* v. *London, Chatham and Dover Ry. Co.*,[1] it was held by the Court of Appeal in England that the holder of a mortgage debenture granted by a railway company in the form given in the schedule to the Companies Clauses Consolidation Act of 1845, was entitled only to a receiver of the profits or fruits of the undertaking, and was not entitled to have the railway or the lands or any part of the capital property of the company sold for the payment of his debt. It will be remembered that the security given by such a mortgage bond is on the undertaking on all the tolls and sums of money arising by virtue of the company's act. The reason for so holding was thus stated by *Lord Cairns*[2]: "When Parliament acting for the public interest authorizes the construction and maintenance of a railway, both as a highway for the public and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred."

It appears, however, from an early date to have been the practice in Canada to include the lands and other capital property of a railway company in a mortgage which the company was authorized to execute. And it was contended that where the Legislature authorized the railway and lands to be made the subject of security it, by implication, authorized the exercise of the ordinary remedies of a mortgagee of lands. The contrary, however, was decided by the Courts of Upper Canada and Ontario, in a case decided in the year 1862, and in subsequent cases which are quoted by the learned Chancellor and the judges of the Court of Appeal, and the reason given was the same as that stated by Lord Cairns, namely, that the vendee could not exercise the franchise by working and operating the railway.

The Quebec Courts, on the other hand, took a different view under a similar circumstance, and held that the railway might be sold as an entirety, but not broken up or sold piecemeal.

Their Lordships see no occasion to doubt the correctness of the law thus laid down by the Courts of Ontario, and it may be assumed to be still applicable to a railway company, the powers of which are regulated exclusively by the law of the province. But as regards companies to which the Dominion legislation is applic-

1 L. R., 2 Ch. 201, App. Cas., 1905.
2 L. R., 2 Ch., 212.

able, a different complexion is put on the matter by the enactments which have been quoted. It is true that s. 14 does not of itself confer upon the Courts a power of sale over the railway, but it does provide a statutory means by which the railway may be operated under the license and with the authority of the Minister of Railways in event of a sale being made at the instance of mortgagees. To quote the language attributed to Lord Watson, "the Legislature has made provision for the transfer of the undertaking."

It can scarcely be doubted that the parties to the mortgage now under consideration, contemplated and intended that the mortgagees should have and enjoy means for the recovery of their principal money other than, and different from, the appointment of a receiver of the profits of the undertaking. The trustees are expressly directed to take proceedings to enforce payment of the principal as speedily as possible, instead of merely operating the railway for the benefit of the mortgagees as was provided in the case of default being made in payment of interest. The proceedings referred to can only be such as may be taken in the ordinary course of law for recovery of money secured by mortgage including a judicial sale of the mortgaged property. It is true that at the date of the mortgage, legal effect could not have been given by the Courts of Ontario to the intention of the parties thus expressed. But the railway having now become subject to the legislation of Canada, and that legislation having provided means by which the transfer of the undertaking may be effected without prejudice to public interest, the difficulty which prevented the Courts from giving to mortgagees of the railway and lands of a railway company, the ordinary legal remedies of a mortgagee has now been removed, and the Court is now able to carry into effect the intention of the parties as expressed in the instrument of mortgage. Their Lordships adopt the language of the learned Chancellor in summing up the reasons for his judgment:" In brief, the Legislature permits a mortgage of the lands of the company. The right of such a mortgage is to enforce his security by a sale of the land. There is now no countervailing right on the part of the public based upon the policy of the Legislature to prevent a sale being had, for upon and after the sale the road will still run its course and serve the public as and when in the hands of the original corporation."

The facts in the case of *Redfield* v. *Corporation of Wickham*,[1] were somewhat different from those in the present case, but the views on the construction and effect of the statute expressed by Lord Watson in delivering the judgment of this Board coincide with those which their Lordships have endeavoured to express.

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1 12 App. Cas., 467.

ATLANTIC AND NORTH WEST RAILWAY CO. v. WOOD.[1]

JURISDICTION OF COURT.

5. Where an award of compensation made in an arbitration under the Canadian Railway Act, 1888 (51 Vict., c. 29), was appealed from under section 161, sub-sect. 2:

6. The Court rightly exercised its jurisdiction by reviewing the award as if it had been the judgment of a subordinate Court, that is by deciding whether a reasonable estimate of the evidence had been made. It was not authorized by the section to disregard the award and deal with the evidence *de novo*, as if it had been a Court of first instance.

LORD WATSON, page 295:—The charge which the Attorney-General prefers against them is, that in closing Blache Lane they exercised a power, franchise, or privilege which did not belong to them and was not conferred upon them by law. It therefore becomes necessary to consider what kind of acts are indicated by the statutory expression "exercises any power, franchise, or privilege." Their Lordships are of opinion that the words were meant to include, not every act done by the company which can be shown to be contrary to law, but such acts only as are either professedly or from their very nature manifestly done in the assertion of some special power, franchise, or privilege. The company might illegally occupy and use a public road and exclude the public in such circumstances as to bring them within the provisions of article 997. On the other hand, if one of their goods trains ran off the line and blocked a highway, and they failed to remove the obstruction within due time, they would be liable to an indictment for nuisance, but could not, in their Lordships' opinion, be reasonably said to have committed the nuisance in the exercise of a power, franchise, or privilege which did not belong to them.

LINE ALONG PUBLIC ROAD.

CASGRAIN v. ATLANTIC AND NORTHWEST RY. CO.[2]

7. The General Railway Act by section 12 gives the local authority an absolute discretion to sanction the construction of a permanent line of railway along a public road.

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1 Quebec, aff., 23rd February, 1895; L. R., 1895, App. Cas., 257; 72 L. T. R., 238; 64 L. J. R., n.s., 116.

2 Quebec, aff., 9th February, 1895, 72 L. T. R., 369; L. R., 1895, App. Cas., 276.

SALE BY MORTGAGE.

GREY v. MANITOBA NORTH WESTERN RY. CO. OF CANADA.[1]

8. In a suit by the appellants, being mortgagees of a division of 180 miles of the respondents' railway and of its revenues subject to working expenses, for a sale of the division and for a receiver and other relief:—

9. It was held: that this division of 180 miles is by the law of Canada applicable to the railway a section capable in sale of its entirety, but that the Provincial Court had no power to order a sale, part of the section being within and part without its jurisdiction; that so long as the railway was worked as a whole the revenues of the division are subject along with other revenues to the working expenses of the whole line, and that the receiver was only entitled to the net earnings of the division so ascertained.

See LEGISLATURE: *Dominion Railway, Municipal code;* STATUTES: *Construction, Extension of line of railway;* RESPONSIBILITY: *Railway Company.*

REGISTRATION.

NULLITY FOR NON-REGISTRATION.

NATIONAL BANK FOR AUSTRALASIA v. FALKINGHAM ET AL.[2]

1. By the 3rd section of the Victorian Book Debts Act, 1896, it is enacted that no assignment or transfer of book debts shall be valid unless registered:—

2. It was held that by its true construction only that part of an instrument which affects assignments or transfer is invalidated by non-registration. The invalidity does not extend to the covenants and recitals therein contained.

3. Where, however, the unregistered assignment of a book debt contained covenants onerous to some of the assignors and a subsequent registered assignment omitted the same:—

4. Held also, that, the second assignment being in substitution for the first, the covenants were no longer enforceable.

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1 Manitoba, varied, 6th March, 1897. L. R., 1897, App. Cas., 254; 66 L. J. R., n.s., 66.

2 Victoria, rev., 9th July, 1902. L. R., 1902, App. Cas., 585

RESPONSIBILITY.

COMMON EMPLOYMENT.

CAMERON ET AL. v. NYSTROM.[1]

1. To an action to recover damages for injury caused by the defendant's servant, the defence of common employment is not applicable unless the plaintiff was at the time of the injury in the defendant's actual employment in the relationship of master and servant.

2. Where the defendants were stevedores, the plaintiff a servant of the shipmaster on whose ship the injury was caused, and the person whose negligence caused the injury was a servant of the stevedores, held, that the defence of common employment was not available.

LORD CHANCELLOR, [illegible] In their Lordships' opinion the House of Lords has decided that where the person sued has committed negligence by one of his servants, the defence of common employment is only available to him where he can shew that the person suing was also his servant at the time of the occurrence of the injury. In the judgment delivered by one of their Lordships in the case of *Johnson* v. *Lindsay*[2] the law was thus stated: "These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for negligence of his servant can shew that the person so seeking to make him liable was himself in his service, the defence of common employment is not open to him."

EVIDENCE.

MCARTHUR v. DOMINION CARTRIDGE COMPANY.[3]

3. A jury having found that an explosion occurred through the neglect of the defendant company to supply suitable machinery and to take proper precautions, and that the resulting injury to the plaintiff was not in any way due to his

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1 New Zealand, aff., 25th April, 1893, L.R., 1893, App. Cas., 308.

2 App. Cas., 1891, 371

3 Supr. C., Canada, Quebec, rev., 11th November, 1904, L. R., 1905, App. Cas., 72; 91 L.T.R., 698; 74 L.J.R., n.s., 31; 53 W. Rep., 305; 21 T.L. Rep., 47.

negligence, the verdict was upheld by the unanimous judgment of two Courts:—

4. The Judicial Committee held that an order by Supreme Court setting aside the verdict on the ground that there was no exact proof of the fault which certainly caused the injury must be reversed. Proof to that effect may be reasonably required in particular cases; it is not so where the accident is the work of a moment, and its origin and course incapable of being detected.

LORD MACNAGHTEN, page 74:—The facts of the case may be stated very briefly. On June 10th, 1898, the appellant, who was in the service of the respondent company, and then about eighteen years of age, was seriously injured by an explosion at the company's works. There is no direct evidence to shew how the explosion occurred. It seems to have originated in an automatic machine used for filling shells or cartridges with powder and shot. The appellant and another boy of about the same age, who was his superior, were minding the machine at the time. It was the appellant's duty to keep the shells with which the machine was fed supplied with shot and wads. The explosion was instantaneous. The flash communicated through a sup[illegible] pipe with a powder-box fixed on the outside of the wall of the room in which the machine stood. The box was placed there so that in the event of an accident the explosion might spend itself in the open air. However, for some reason or other, the box had been strengthened externally, and the force of the explosion took effect inwards. The wall was blown in, the machine knocked to pieces and the room entirely wrecked.

On June 9th, 1899, this action was brought in the name and on behalf of the appellant, then a minor, by his tutor. The [illegible] on behalf of the plaintiff was that the explosion was owing [illegible] fault of the company. The company, on the other hand, denied responsibility, and alleged that the mishap was caused by the negligence of the plaintiff himself.

The jury found that the explosion occurred through the fault and neglect of the company "by their neglect to supply [illegible] machinery," and "by their neglect to take proper precautions [illegible] prevent an explosion." They also found that the injur[illegible] the plaintiff complained was not "[illegible] was caused [illegible] fault, neglect, or negligence." [illegible] assessed the [illegible] at $5,000.

The learned judge who presid[illegible] trial [illegible] as he was authorized to do by the [illegible] the consideration of the Court of Review. That [illegible] with costs a motion on behalf of the company for [illegible] a new trial, and confirmed the verdict in favour [illegible]

No complaint was made of the learned judge's summing-up or the way in which the questions were left to the jury.

In Quebec, when an unsuccessful party, after verdict, moves for judgment or a new trial, the function of the court under the Civil Procedure Code is the same as the function of a Court of Appeal in this country in similar circumstances. It is not the province of the court to retry the question. The court is not a court of Review for that purpose. The verdict must stand if it is one which the jury, as reasonable men having regard to the evidence before them, might have found, even though a different result would have been more satisfactory in the opinion of the trial judge and the Court of Appeal.

That there was evidence to justify the verdict in the present case can hardly be disputed. The automatic machine, which had been in use for rather over a year, was designed in the works of the company. The designer himself, who was the company's superintendent, and apparently a clever and skilled mechanic, and the man who made the machine under his instructions and direction, spoke of it in terms of the highest praise. But no independent expert was called to echo their encomium or confirm their view of its suitability for the purpose in hand. It was not patented, but still it does not seem to have been adopted in any other works of the sort. In the judgment of the majority of the learned judges of the Supreme Court, delivered by Girouard, J., it is stated that it was "proved that the machine was perfect, and worked regularly and properly." But company's witnesses did not go so far as that. They admitted that there was room for improvement, and that improvements were to be introduced in a machine that was then being constructed to take its place. The principal fault or defect of the machine seems to have been in the mechanism used in the last stage of the process. When cartridges are charged they have to be "crimped," that is the edges have to be turned down so as to hold the charge firmly in its place. The design was that each cartridge, when, and as it was loaded, should be clutched by automatic fingers and carried off to another part of the machine and there presented, sitting upright on the inside edge of a hollowed cup, to receive the blow or punch which would complete the operation. But these automatic fingers, occasionally at any rate, acted in an uncertain, not to say an erratic manner. Up to the time of the explosion, though no doubt less frequently at the last than at first, cartridges were now and then presented in a wrong posture, and the blow or punch fell sometimes on the side of the cartridge and sometimes on the metal end in which [illegible] percussion [illegible] had been inserted. The evidence was [illegible] these failures occurred [illegible] the injured cartridges were collected and sent away to be [illegible] or broken up. It seems to be not an unreasonable inference [illegible] the facts proved that in one of these [illegible] that [illegible] percussion [illegible] was

ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it was established to the satisfaction of the jury was not owing to any negligence or carelessness on the part of the operator. The wonder really is, not that the explosion happened as and when it did, but that things went on so long without an explosion. Then, too, the jury may have reasonably thought that the explosion would or might have been comparatively harmless if the powder-[illegible] the outside had been properly constructed. The [illegible] judge in the Supreme Court appear to have been much [illegible] by some decisions in France [illegible] are stated [illegible] be "unanimous in exacting proof of [illegible] certain [illegible] the injury." The [illegible] judge had [illegible] "as to the cause of [illegible] are [illegible] the dark [illegible] highest respect and [illegible] are [illegible] of binding authority in Quebec [illegible] properly abstained from [illegible] to [illegible]

[illegible] for [illegible] they were [illegible] a particular case [illegible] an hardly [illegible] accident causing the injury [illegible] the work [illegible] incapable of detecting its origin [illegible] It cannot be of universal application, [illegible] carry with it complete immunity [illegible]

EXERCISE OF STATUTORY POWERS.

DUMPHY v. MONTREAL [illegible] HEAT [illegible] POWER COMPANY.[1]

5. A derrick [illegible] one of the streets of Montreal [illegible] the overhead wires of the respondent [illegible] a current of electricity was [illegible] the appellant's husband.

6. Held [illegible] by Quebec Act 1 Edw. 7, [illegible] 10 in the [illegible] place their wires either overhead [illegible] of negligence in adopting one [illegible] other, or in neglecting to insulate or guard [illegible] of evidence that such precautions [illegible] the accident.

[illegible] The pro[illegible] was that the respondents [illegible]

[1] [illegible] 1907 [illegible] App. Cas. 454 [illegible]

to place their wires either overhead or underground, were bound to adopt whichever method afforded the greatest protection to the public, and were guilty of negligence if they failed to do so. The Court of Review, before whom the case was next brought, adopted this proposition, and gave judgment against the respondents. On an appeal to the Court of King's Bench this judgment was reversed, and the appellant's action was dismissed. The result is the present appeal.

The voluminous evidence and elaborate pleadings contain little which purports to discriminate this street from streets in general, as regards the danger or safety of overhead wires. Accordingly the proposition maintained is the somewhat bold one that, the Legislature having authorized in these streets of Montreal overhead wires as well as, and just as, underground wires, the respondents are guilty of negligence in exercising one of those alternative powers. To their Lordships it seems impossible to support this contention. There are various decisions pretty directly in point. But it is never desirable to rest on the authority of other decisions what is the plain reading of a statute.

The second ground, upon which negligence has been found, exhibits with singular frankness the essential defect of the appellant's case on this second head. The finding is not that insulating the wires or guard wires was an efficient remedy which would have prevented the accident and which the respondents were negligent in not adopting. On the contrary, the verdict assumes that it is an open question whether what the jury suggest would have done any good at all. Their complaint is that the respondents did not experiment on the efficacity of such arrangement. It is impossible to regard this, in the absence of substantive and affirmative evidence, and in view of the adequate support received by the respondents from their witnesses, as a good ground of liability or negligence.

MALICIOUS PROSECUTION.

See MALICIOUS PROSECUTION: *Probable cause.*

MASTER AND SERVANT.

BLACK v. CHRISTCHURCH FINANCE CO.[1]

7. A person who authorises another to perform an operation on his land, which is necessarily attended with danger to his neighbours, is bound [illegible] only to stipulate that all reasonable

1 New Zealand, rev., 16th December, 1893, L. R., 1894, App. Cas., 48; 70 L. T. R., 79; 63 L. J. R., n.s., 32.

precautions should be taken to prevent damages but to see that they are observed.

8. The defendant company was liable in damages for the act of its contractor in negligently and improperly lighting a fire on its land and permitting it to spread to the plaintiff's land; even though such contractor in so doing disregarded special stipulation contained in such contract relative to the time at which such fire should be lit.

9. To escape liability the defendant must shew that the act of the contractor was that of a trespasser and was not within the scope of its contract.

LORD SHAND, page 54:—The lighting of a fire on open bush land where it may readily spread to adjoining property and cause serious damage is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property *sic utere tuo est alienum non laedas;* and if he authorizes another to act for him he is bound not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences (see *Hughes v. Percival*[1] and authorities there cited). Cases may indeed occur in which no precautions could be adopted which could reasonably be expected to avert the danger, of which the present appears to be a pretty clear instance, for it is scarcely conceivable that when once the fire was lit, not at a suitable or favourable time, but with the wind blowing as it was, any means which could be suggested would have saved the consequences which occurred.

NON-NATURAL USE OF PROPERTY.

EASTERN AND SOUTH AFRICAN TELEGRAPH COMPANY v. CAPE TOWN TRAMWAYS COMPANIES.[2]

10. The principle of *Rylands v. Fletcher*[3] is not inconsistent with the Roman law. It imposes a liability on a proprietor which is measured by the non-natural user of his own property, not by that of his neighbour. It applies to a proprietor who stores electricity on his land if it escapes therefrom and injures a person or the ordinary use of property. It does not apply to the case of injury done to a peculiar trade apparatus unnecessarily

1 8 App. Cas. 443.
2 Cape of Good Hope, of 18th April, 1902 L. R. 1902 App. Cas. 381, 18 T. L. R. 523.
3 L. R. 3 H. L. 330.

sarily so constructed as to be affected by minute currents of the escaping force.

11. In an action for damages by the appellant company for disturbances in the working of their submarine cable caused by an escape of electricity stored by the respondents for the working of their tramway system.

12. In regard to that section of the tramway which had not been constructed under statutory authority, *Rylands* v. *Fletcher*[1] and not apply, because the disturbances only resulted when the cable was constructed without certain precautions which the [illegible] established, and subsequently secured its immunity:

In regard to those sections of the tramway which have been constructed under statutes (Act 22 of 1895 and Act 29 of 1896), the escape of electricity, being a natural incident of the operations legalized thereby, and not resulting from [illegible] meaning of the statutory undertaking or concession, did not impose liability on the respondents.

Lord Robertson, page 391:—Now, if regard be had solely to [illegible] of the respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Rylands* v. *Fletcher*,[1] of the kind of things which a proprietor can only do at his own peril. Electricity (in the [illegible] which we are now dealing with) is capable when unchecked of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in *Rylands* v. *Fletcher*,[1] and the principle would apply.

Page 393:—The true comparison is with things used in the ordinary enjoyment of property, and this instrument differs from such things in its peculiar liability to affect even minute currents of electricity. Now, having regard to the assumptions of the appellants' argument, it seems necessary to point out that the appellants, as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners. apparatus of such concerns requires special protection against the operations of their neighbours. that must be found in legislation; the remedy at present invoked is an

1 L. R., 3 H. L., 330.

appeal to less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Rylands* v. *Fletcher*,[1] which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubtful penal if it implied a liability to property. Nor need the law be regarded as showing any want of adaptability to modern circumstances if this be the true view, for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain.

While agreeing in the result with the Supreme Court on the common law branch of this case, their Lordships are not prepared to accede to some of the comments made in *Rylands* v. *Fletcher*.[1] The learned judges of the Supreme Court have indicated considerable reluctance to accept the doctrine of that case, and seem to regard it as more or less inconsistent with the principles of the Roman law, upon which the law of the colony is based. Their Lordships are unable to find adequate ground for this view, and it was not maintained at the bar. It is not supported by the texts or decisions which illustrate the full recognition of the right of an owner freely to use his property for natural purposes, even although loss to his neighbour may result. Nor, on the other hand, does the prominence given to culpa in Roman law preclude the reception of the doctrine now under consideration into legal systems founded on the civil law. The learned judges, and also Kekewich, J., in *National Telephone Co.* v. *Baker*,[2] seem to have been inaccurately informed on this point, for, as a matter of fact, not only is the principle of *Rylands* v. *Fletcher*[1] fully accepted in Scotland, but it had formed part of the law of Scotland before *Rylands* v. *Fletcher* was decided, and *Rylands* v. *Fletcher* has been treated by the Scottish courts as an authoritative exposition of law common to both countries.

RAILWAY COMPANY.

EAST INDIAN RAILWAY v. KALIDAS MUKERJEE.

14. Railway companies are bound to use proper care and skill in carrying their passengers; but they are not liable as common carriers of passengers independently of negligence.

15. Where a passenger was killed in a railway carriage by an explosive illegally introduced into it.

16. The railway company was not liable in damages unless guilty of negligence in permitting the fireworks to be brought

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1 L. R. 3 H. L., 330.

2 (1893) 2 Ch., 186.

3 Bengal, rev., 21st February, 1901, L. R., 1901, App. Cas., 396; 84 L. T. R., 210; 70 L. J. R., n.s., 63; 17 T. L. R. p., 284.

into the carriage. As it was not the duty of the company to search every parcel carried by a passenger, the onus was on the plaintiff to show that the parcels containing the fireworks suggested dangers.

LORD HALSBURY, L. C., page 401:—One source of error which their Lordships think has been committed in the judgments below, is an apparent misunderstanding of what has been decided in the Court of this country as to the true obligation which exists on the part of a railway company towards its passengers. The learned judge, Ameer Ali, in terms says: "Now, it may be regarded as settled law that, in the case of carriers of passengers under statutory powers, there exists an express duty, independently of any implied contract, to carry them safely." Their Lordships observe that in the course of Mr. Asquith's argument yesterday, he used the same phrase: that the extent of the obligation of a railway company is to carry safely, in short, that they are common carriers of passengers. That is not the law. It appears to have given rise to the impression that, that being the state of law, it was for the railway company to prove beyond doubt that they were not responsible for the accident that occurred. As a matter of fact, the argument would be illogical, because, if they were carriers they would be responsible, quite independently of any question whether there was negligence or not. It would be enough to show that the passenger had not been carried safely, which would at once establish liability. The learned judge appears to have been misled by an observation of Lord Campbell, in the case that he quotes of *Collett v. London and North Western Ry. Co.*[1] that turn upon the duty of the railway company, which was set out in the declaration, to carry a post-office clerk under certain provisions of railway legislation. It was demurrel to upon the ground that there was no contractual relation between the post-office clerk and the railway company. The judgment upon demurrer is sufficiently explained in one book at the allegations in the declaration and the judgment upon it. But, unfortunately, Lord Campbell used a phrase which the learned judge, Ameer Ali, quotes, that the railway company were under an obligation to carry safely, which their Lordships think has been the origin of the error. Lord Campbell says: "I am of opinion that there is no difficulty in the question which has been raised. The allegation that it was the duty of the company to use due and proper care and skill in conveying is admitted"—admitted, that is to say, by the demurrer. "That duty does not arise in respect of any contract between the company and the persons conveyed by them, but is one which the law imposes. If they are bound to carry, they are bound to carry safely." That, probably, is the origin of the error which their Lordships think the learned judges below have fallen into. What Lord Campbell is saying there is, that they are not relieved from the ordinary

1 16 Q. B., 984.

obligations which would exist by contract because by statute they were compelled to carry the post-office clerk; and he goes on to say that the obligation is not satisfied by carrying a man's corpse and not himself. His mind is not applied at all to the extent of the obligation created, but his mind is upon the argument that there was no obligation at all; and he practically says, "you must take as much care of him as if he was a passenger who contracted with you." Whatever may be the difficulty that arises about such a phrase in Lord Campbell's mouth, there is no difficulty whatever if one looks at the declaration and the assignment of the breach of duty, where the duty is set up, as, indeed, Lord Campbell, in the earlier parts of his judgment points out, to carry with reasonable care and diligence; and the allegation in the declaration, corresponding to the duty which exists, is that they did not do so; and then the assignment of breach is not that the man was not carried safely, which according to the argument would be sufficient, but the allegation is that they did not use proper care and skill in the carrying. If one looks at that, and indeed, at the two other cases which the learned judge, Ameer Ali, quote as justifying the onus that he throws upon the railway company, it is intelligible enough. In the one case it was a child under three years of age, between whom and the railway company of course, there was no contract; and the other is a case of the same character. It is important, perhaps, to observe what runs through the judgments, and to observe that Mr. Asquith, naturally enough, used the same phrase yesterday in his argument as enforcing the necessity of the railway company discharging themselves by any conceivable evidence by saying that their contract was to carry safely. Their Lordships say it is desirable that the error should be plainly stated, because it may mislead others hereafter. It is enough to say that, in their Lordships judgment, there is no such obligation on the part of the railway company.

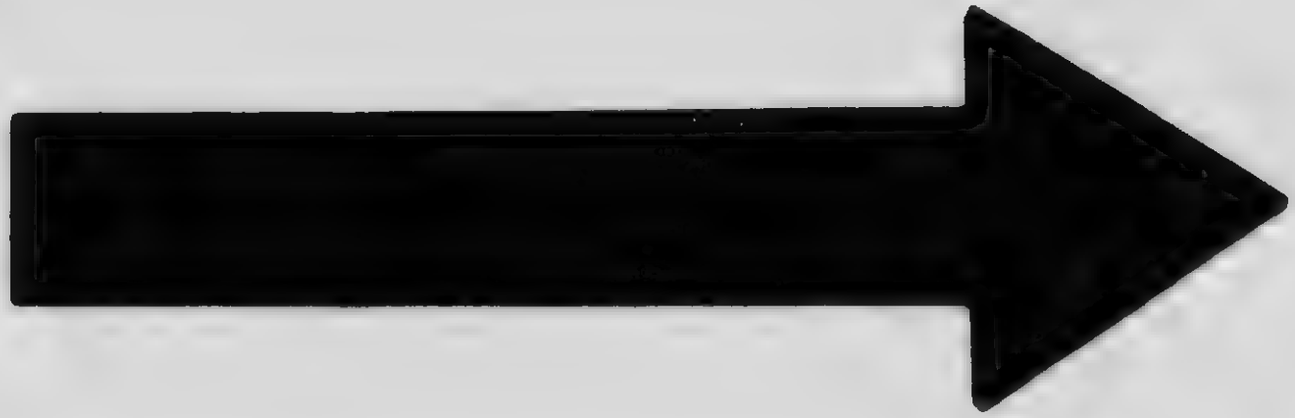
REPRESENTATIVES OF CLUB.

WISE v. PERPETUAL TRUSTEE COMPANY.[1]

17. The rule that trustees are entitled to be indemnified by their *cestuis que strustent* against liabilities incurred by their holding trust property does not not apply to cases where the nature of the transaction excludes it

18. An ordinary club is formed upon the tacit understanding, judicially recognized, that no member as such becomes liable to pay to its funds or otherwise any money beyond the subscriptions required by its rules.

1 New South Wales, rev., 13th December, 1902, L. R., 1903, App. Cas., 139



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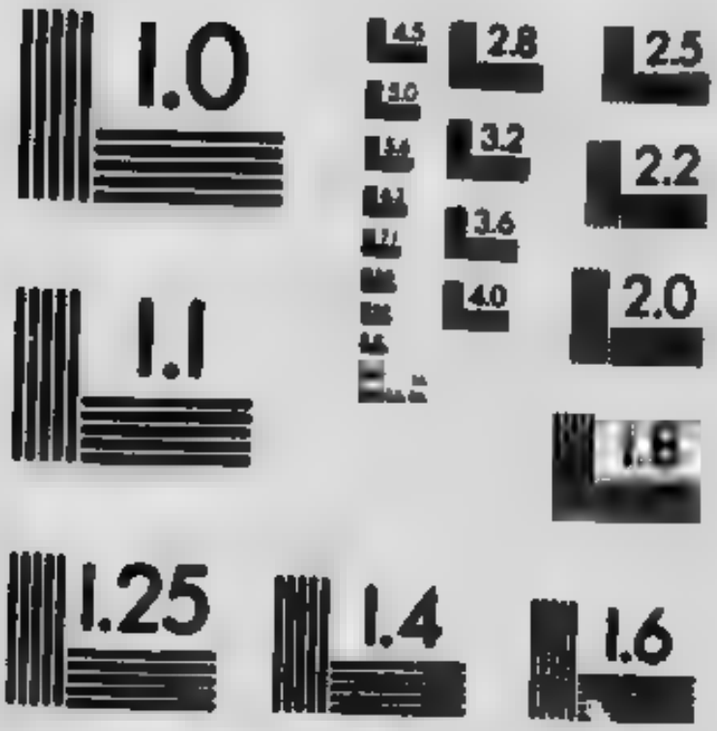

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19. Trustees of a club who have incurred liability under onerous covenants contained in a lease, accepted by them on its behalf, are entitled to idemnity out of any property of the club to which their lien as trustees extends. Its members are not, by reason only of being *cestuis que trustent,* personally liable to indemnify them, where there is no rule imposing such liability upon them.

LORD LINDLEY, page 149:—In *Hardoon* v. *Belilios,*[1] this Board had to consider the right of trustees to be indemnified by their *cestuis que trustent* against liability incurred by the trustees by holding trust property. The right of trustees to such indemnity was recognized as well established in the simple case of a trustee and an adult *cestui que trustent.* But, as was then pointed out, this principle by no means applies to all trusts, and it cannot be applied to cases in which the nature of the transaction excludes it.

Clubs are associations of a peculiar nature. They are societies, the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay the funds of society or any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed, but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognized. It has been so recognized in actions by creditors and in winding-up proceedings: See *Flemying* v. *Hector,*[2] *St. James Club.*[3]

Apart from an observation of Lord St. Leonard's in the last case, and which observation is in favour of the appellant, the only reported case in which a court has had to consider the application to a club of this right to indemnity, is *Minnitt* v. *Lord Talbot.*[4] In that case some members of a club, who had guaranteed the repayment of money borrowed for the club, sought indemnity, not only out of the property of the club, but from the members personally. The Court, which had already given effect to their lien,[5] afterwards made an additional order and enquiry similar to those made in this case. The grounds upon which this addition to the original decree was made do not appear; nor does it appear what where the grounds on which any member was held to have incurred liability. This case does not, therefore, assist their Lordships on the present occasion.

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1 (1901) App. Cas., 118.
2 (1826) 2 M. & W., 172.
3 2 D. M. & G., 383.
4 L. R. J., 7 Ch., 407.
5 L. R. J., 1 Ch., 143.

The question now to be decided may be regarded as not yet covered by authority, and a choice must be made between either ignoring the essential features of a club or holding that the rule established in *Hardoon* v. *Belilios*,[1] is inapplicable to such a body of persons. Their Lordships feel no difficulty in making this choice. The trustees of a club are the last persons to demand that the fundamental conditions on which their *cestuis que trustent* have become such shall be completely ignored.

The appellant in this case is not, in their Lordships' opinion, under any legal or equitable obligation to pay or contribute anything towards the indemnity of the plaintiffs, but he has offered to do so, and the plaintiffs are not satisfied with his offer.

RETROACTIVITY OF LAW.

See LEGISLATURE: *Eod. vis;* STATUTES: *Retroactive effect.*

RIGHTS OF WIDOW AND CHILDREN.

MILLER v. CANADA GRAND TRUNK RAILWAY.[2]

20. The right of action conferred by art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by the fault of his employer is an independent and personal right and not derived from the deceased or his representatives.

21. And the deceased could not be said to have "obtained satisfaction" from the respondent company within the meaning of that article unless he had obtained a real and tangible indemnity for the fault in question.

22. Where the deceased as a condition of his employment became a member of an insurance and provident society, a by-law of which provided that in consideration of the respondents' subscription thereto no member thereof or his representatives shall have any claim against the respondents for compensation on account of injury or death from accident; and it appeared from the society's provisions for sick allowance and insurance that the respondents contributed only to former, the latter being a scheme for mutual life insurance:—

23. Even assuming this by-law to be valid, the deceased had not obtained satisfaction within the meaning of article 1056.

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1 1900, App. Cas., 118.

2 Canada, Supr. C., Quebec, rev., 14th February, 1906. L. R., 1906, App. Cas., 187; 12 R. L., n.s., 77; 94 L. T. R., 231; 22 T. L. R., 297; Q. J. R., 15. K. B., 118; 75 L. J., n.s., 45.

The insurance money did not proceed from the respondents, had no relation to its offence, and was equally payable in case of natural death. *Reg.* v. *Grenier*,[1] overruled.

LORD DAVEY, page 191:—It has been decided by this Board in *Robinson* v. *Canadian Pacific Ry. Co.*,[2] that the right of action of the widow and relatives under this article is an independent and personal right of action and not, as in the English act, known as Lord Campbell's Act, conferred on the representatives of the deceased only. The right of action of the appellant is therefore *primâ facie* clear, unless the deceased in his lifetime obtained indemnity or satisfaction for the negligence of the respondent company or its employees. Indemnity he had none, for neither he nor his representatives ever received, or became entitled to receive anything on that account, but it is said that Ramsden "obtained satisfaction," and it is sought to show that as follows:

Page 194:—Assuming the by-law to be valid, is it, in the circumstances, an answer to the appellant's action? It is not sufficient to say that the possible right of action of the deceased has been extinguished, as was held in the case of *Robinson* v. *Canadian Pacific Ry. Co.*,[2] where it had been lost by prescription. And, as Lord Watson pointed out, the provision as to duelling in article 1056 shows that cases were intended to be comprised in which there could be no right of action in the deceased. Their Lordships see no reason why the release or discharge by the deceased of his possible right of action should be held to be satisfaction within the meaning of article 1056 of itself, or unless the deceased has thereby obtained from the offender something which is a real and tangible indemnity or satisfaction for the offence or quasi-offence in question. In this case Ramsden, of course, was not, and neither his representatives nor his widow nor his children were entitled in consequence of the offence or quasi-offence of the company to a single dollar out of the sick fund. The insurance cannot be considered to be such indemnity or satisfaction, first, because the money payable in respect of it did not (according to the rules) proceed from the offender even in part; and, secondly, because the payment is independent of, and bears no relation to the offence or quasi-offence, and would equally have to be made if the deceased had died a natural death. Their Lordships are aware that evidence was given that the respondent company does not recognize any division of the society and makes its contribution to the society to be used as it pleases. But this is not in accordance with the scheme contained in the rules, and for the present purpose their Lordships can only regard the rules as they stand.

Holding the views which have been expressed, their Lordships

1 1899, 30 Supr. C. R., 42.
2 1892, App. Cas., 481.

do not find it necessary for them to discuss the question raised on section 243 of the Dominion Railw Act, 1888.

Their Lordships are not sure that in coming to a conclusion in favour of the appellant they are differing from the real opinion of the learned judges in the Supreme Court. Chief Justice Taschereau said, in the course of his judgment:—

"Here, were I unfettered by authority, I would be inclined to doubt if the deceased can be said to have received any indemnity or satisfaction, but I am bound by the authority of *Reg. v. Grenier*,[1] to hold that he has."

And the other learned judges who delivered judgments in favour of the respondent company also hold themselves bound by that decision which they thought could only be distinguished if the company was itself in fault, and not merely responsible for the fault of its employees. In *Reg. v. Grenier*,[1] the judgment of the Court was delivered by Chief Justice Strong. The learned judge held that the action given by article 1056 is merely an embodiment in the Civil Code of the action which had previously been given by a statute of Canada re-enacting Lord Campbell's Act, and that, therefore, the English decisions in that Act, such as *Griffiths v. Earl of Dudley*,[2] were applicable to the case. He is reported to have said:—

"It must be acknowledged that if the deceased would, if he had survived, have had no claim for damages against the Crown, the suppliant can have none, provided we are right in assuming this to be a proceeding to be governed by the law applicable to actions under Lord Campbell's Act."

The assumption thus made was admitte learned counsel to be erroneous, and their Lordships cannot attach any weight to a decision founded upon it.

See BANK AND BANKING: *Liability of President;* CORPORATION (*company*): *Liability of directors;* CORPORATION (*Municipal*): *Negligence, Public Street;* DAMAGES; HUSBAND AND WIFE. TRUSTEE: *Eod. vo.*

RIPARIAN PROPRIETOR.

SALE OF WATER POWER.

HAMELIN ET AL. v. BANNERMAN ET AL.[3]

1. A riparian proprietor, notwithstanding that the river is navigable, can acquire an interest in its water-power, as derived

1 30 Supr. C., Canada, 42.
2 1882, 9 Q. B. D., 357.
3 Quebec aff., 2nd February, 1895, L. R., 1895, App. Cas., 237; 72 L. T. R., 128; 64 L. J. R., n.s., 66; 33 W. R., 639

from a reservoir artificially formed by a dam across its channel, and sell the same along with and as appurtenant to his land. Even if such sale should not be effectual against the public, the vendor cannot himself impeach it on that ground.

2. In this case, the vendor of a specified amount of water-power had not reserved to himself a right to a supply either *pari passu* with or preferably to the purchaser, therefore the latter was entitled to damages in respect of any loss incurred by the vendor's user of the water in diminution of the amount sold.

LORD WATSON, page 237:—The fact that the North River may be in some sense navigable cannot prevent riparian owner from acquiring an interest in its water power, which he can sell along with and as appurtenant to a parcel of his land. Even if the appellants had been unable, as they say they were, to give the respondents a good title as against the public, the law would not have permitted them first to sell a prior right [illegible] e water power, and pocket the price, and then to pose as men[illegible]s of the public, and to deprive their purchaser of the water by using it themselves.

WATER CHANGING ITS COURSE.

THAKURAIN v. THAKURAIN.[1]

3. Where a non-tidal river separating two estates belonging to different owners suddenly changes its course, the property in the soil does not change.

SIR ANDREW SCOBLE, page 638:—The principle laid down in that regulation, as Lord Justice James observed in giving the judgment of this committee in the well known case of *Lopez* v. *Mudden Mohun Thakoor*,[2] is one not merely of English law, nor a principle peculiar to any system of municipal law, but it is a principle founded on the universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property remains in the original owner.

It appeared to their Lordships that this was one of the cases provided for by the second clause of the fourth section of the regulation, which enacted that the rules as to gradual accretion "shall not be considered applicable to cases in which a river, by a sudden change of its course, may break through and intersect an estate, with any gradual encroachment, or may, by the violence of stream,

1 India, aff., 1st July, 1905, 21 T. L. R., 637.
2 13 Moore, I. H., 467.

separate a considerable piece of land from one estate and join it to another estate without destroying the identity, and preventing the recognition of the land so removed. In such cases the land, on being clearly recognized, shall remain the property of its original owner." That was in accordance with the English law, as laid down in Mayor, etc., of *Carlisle* v. *Graham*.[1] "All the authorities, ancient and modern, are uniform to the effect that if by the eruption of the waters of a tidal river, a new channel is formed in the land of a subject although the rights of the Crown and of the public may come into existence and be exercised in what has thus become a portion of a tidal river.....the right of the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course and leave the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public." It was, perhaps, unnecessary to add that although the specific reference in that case was to a tidal river, their Lordships considered the principle equally applicable to a non-tidal river.

See LEGISLATURE: *Eod. vo.*

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1 1 L. R., 4, Ex. 361, p. 368.

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SALE.

BY CORRESPONDENCE.

HARVEY ET AL. v. FACEY ET AL.[1]

1. Where the appellants telegraphed: "Will you sell us B.H.P.? Telegraph lowest cash price," and the respondent telegraphed in reply: "Lowest price for B.H.P. 900?" and then the appellants telegraphed, "We agreed to buy B.H.P. for 900 asked by you? Please send us your title-deed in order that we may get early possession," but received no reply:

2. This mere statement of the lowest price at which the vendor will sell contains no implied contract. The final telegram was not the acceptance of an offer to sell, for none had been made. It was itself an offer to buy, the acceptance to which must be expressed and could not be implied.

BY TRUSTEE.

WILLIAMS v. SCOTT.[2]

3. In an action by a purchaser of land against a vendor for recision of contract:—

4. It was decided that the title disclosed being that of a purchaser, from himself as trustee for sale, it was inequitable to force it upon the plaintiff.

5. A defence that, notwithstanding the form of the transaction, the defendant really derived title from the beneficiaries who assented to the transaction with full knowledge of all circumstances must be proved by clear affirmative evidence to that effect.

6. A further defence that there had been an intermediate sale to a third person and purchase by the trustee from him will not avail, unless that sale were a completed one.

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1 Jamaica, rev., 29th July, 1892, L. R., 1893, App. Cas., 552; 69 L. T. R., 504; 62 L. J. R., n.s., 97; 42 W. R., 129; 9 T. L. R., 612.

2 New South Wales, rev., 19th June 1900, L. R., 1900, App. Cas., 499; 69 L. J. R., n.s., 77; 49 W. R., 33; 16 T. L. R., 490.

7. A trustee cannot adopt for his own benefit an executory contract to purchase to which he is a party as vendor, *Parker v. McKenna.*[1]

SIR FORD NORTH, page 303:—It is clear, undisputed law that trustee for the sale of property cannot himself be the purchaser of it—no person can at the same time fill the two opposite characters of vendor and purchaser.

DESCRIPTION OF LAND.

HORNE ET AL. V. STRUBEN ET AL.[2]

8. Where a grant of land specifies definite boundaries "as will further appear by" a plan, if the plan contradicts the unambiguous text of the grant, it must give way to it.

JUDICIAL SALE.

9. *See* RAILWAY: *Judicial Sale*

PRICE.

KENSINGTON LAND COMPANY ET AL. V. CANADA INDUSTRIAL COMPANY.[3]

10. The fact that the price actually paid to the vendor is less than that appearing on the face of the contract is no answer to an action for the balance of purchase money due when no attempt has been made to set aside the contract of sale, but it has been acted upon.

RECITALS IN DEED.

TRINIDAD ASPHALT CO. V. CORYAT.[4]

11. Recitals in a deed are not a representation of fact in the faith of which a stranger to the deed is entitled to act without inquiry.

12. Where the plaintiff, a purchaser of a legal estate, had express notice that the defendants obtained possession of the land

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1 1874, L. R., 10 Ch., 96.

2 Cape of Good Hope, aff., 18th June, 1902, 87 L. T. R., 1; 71 L. J. R., n.s., 88.

3 Quebec, aff., 28th March, 1902. 88 L. T. R., 711; L. R., 1903, App. Cas., 213.

4 Trinidad, rev., 28th July, 1896, L. R., 1896, App. Cas., 587.

bought under a deed which purported to convey to them an equitable title thereto:—

13. Held that he must convey the legal estate to the defendants. Erroneous recitals in the deed as to the derivation of the equitable title actually transferred did not estop the defendants or vitiate the notice.

SIGNIFICATION OF TRANSFER OF CLAIM.

BANK OF TORONTO v. ST. LAWRENCE FIRE INSURANCE COMPANY.[1]

14. Under articles 1570 and 1571 of the Civil Code of Lower Canada, signification to the debtor of the act of sale of his debt need to be by a notarial act.

15. *Quaere* whether the debtor is a "third person," within the meaning of the latter section against whom signification is necessary in order to perfect possession.

16. The institution of an action against the debtor is itself a sufficient signification of the transfer of the debt.

LORD MACNAGHTEN, page 65:—It was strenuously contended, and the contention had already found favour with the Superior Court and a majority of the Court of King's Bench, that the action must fail because the bank had not duly made "signification" as required by the Civil Code "of the act of sale" which gave rise to their claim. It was not disputed that there had been a transfer of the debt, that notice of the transfer had been given to the respondent company, and that a document which purported to be, and is, in fact a copy of the transfer had been furnished to them. But they maintained that "signification" must be made by a notary and that a copy ought to have been authenticated or certified, and that for want of these formalities the notification of the transfer was without legal effect. On this point, their Lordships have had the advantage of considering the reasons given by Wurtele, J., for dissenting from the majority of the Court. His judgment, in which Hall, J., concurred, seems to their Lordships to be a careful and accurate exposition of the law, and their Lordships are satisfied to adopt it as the basis of their judgment. It will, therefore, not be necessary for them to do more than state very briefly the grounds on which they think the decision under appeal ought to be reversed. It appears to their Lordships that the question must depend simply upon the provisions of the Civil Code, without introducing or importing any requirements which, though necessary

1 Quebec, rev., 16th November, 1902, L. R., 1902, App. Cas., 59; 87 L. T. R., 462; 72 L. J. R., n.s., 15; 19 T. L. R., 69.

under custom of Paris under modern French law, are not found in the Code as it stands. Now, the provisions of the Code, as regards the sale of debts, are contained in articles 1570 and 1571. Article 1570 provides that "the sale of debts.....is perfected between the seller and buyer by the completion of the title if authentic, or the delivery of it if under private signature." Then article 1571 declares that "the buyer has no possession available against third persons until signification of the act of sale has been made and a copy of it delivered to the debtor himself, as mentioned in article 1751."

There is nothing in the Civil Code to show that the intervention of a notary is required. It is certainly not prescribed in terms, nor is there, in their Lordships' opinion, any room for implication in this matter.

The view of Wurtele, J., in which their Lordships concur, is confirmed by the provisions of article 1571a, added by the Revised Statutes of Quebec (1888), which explains how "the signification of the sale required by article 1571" may be affected whenever "the debtor has left or never had his domicile in the province." It receives further confirmation from the exceptional provisions made in the Revised Statutes "for the assignment and transfer of consolidated rents replacing seignorial dues." Those provisions, which are embodied in article 5610, do require "a natural act in authentic form." Apparently this requirement would have been unnecessary if a notarial act had been the universal rule.

Their Lordships do not stop to inquire whether the debtor is a "third person" within the meaning of article 1751, as seems to have been assumed in the courts below, and is stated expressly by Sir A. Lacoste, C.J. The question is not material in the present case. It appears, however, to their Lordships that if the point should hereafter arise, it would require further consideration. There is one point which their Lordships cannot leave unnoticed. Some of the learned judges who have taken part in the case express a strong opinion: it is not competent for the assignee of a debt to bring an action for the purpose of enforcing his claim against the debtor until "signification" of the act of sale has been made and a copy of it delivered to the debtor. This view is in accordance with a recent ruling of the Supreme Court: *Murphy* v. *Bury*,[1] though until that decision was pronounced the general opinion seems to have been the other way. (See *Aylwin* v. *Judah*,[2] *Martin* v. *Coté*;[3] *Quinn* v. *Atcheson*.[4] It appears to their Lordships that the institution of an action against the debtor to recover the debt is of itself a sufficient signification of the act of sale, and their Lordships agree with Wurtele, J., in

1 24 Can. S. C., 668.
2 9 L. C. J., 179.
3 1 L. C. R., 239.
4 4 L. C. R., 378.

thinking that there is nothing in the Code which requires the signification of the act of sale and the delivery of a copy of it to the debtor to be made at one and the same time.

See INSOLVENCY: *Registration*; PRINCIPAL AND AGENT: *Sale to agent*; RAILWAY: *Sale by mortgagee*; RIPARIAN PROPRIETOR: *Sale of Water-power.*

WARRANTY.

See RIPARIAN PROPRIETOR: *Sale of Water power.*

SALVAGE.

INJURY TO SALVING VESSEL.

MASTER AND OWNERS OF SS. BAKER STANDARD v. MASTER AND OWNERS OF SS. ANGELE.[1]

1. Where the vessel of a salvor has, without default on his part, been injured in the performance of salvage services, compensation may be awarded to him in respect of the injury so sustained and damages consequent thereon; or the salvage may be assessed on a liberal scale, so as to cover the loss and afford an adequate reward for the services rendered:—

2. The presumption is that the injury is caused by the necessities of the services, and that the *onus probandi* is on those who allege default by the salvors. The amount of compensation awarded by the Court below will not be reduced unless it appears to be grossly in excess of what is right.

LORD NORTH, page 552:—It is clearly settled that when the vessel of a salvor has, without default on his part, been injured in the performance of salvage services, compensation may be awarded to him in respect of the injury so sustained, and damages consequent thereon. It was laid down by this Committee in the case of *Bird and others* v. *Gibb and others "The De Bay"*[2] that it is always justifiable—and sometimes important, if it can be done—to ascertain what damages and losses the salving vessel has sustained in rendering salvage services. It is often difficult and expensive, and sometimes impossible, to ascertain exactly the amount of such loss, and to afford also an adequate reward for the services rendered. It was also laid down in the case of *The Thomas Blyth*,[3] that when the vessel of a salvor is injured or lost while engaged in a salvage service, the presumption is that the injury or loss is caused by the

1 Consular C., aff., 13th June, 1901. L. R., 1901, App. Cas., 549; 94 L. T. R., 788; 70 L. J. R., n.s., 98; 17 T. L. R., 584.
2 1883, 8 App. Cas., 559.
3 1860, Lush, 16.

necessities of the service, and not by the default of the salvors; and that the burden of proof lies upon the parties who allege that the loss was caused by the salvors' own acts.

PROPERTY OF THE CROWN.

YOUNG v. S.S. "SCOTIA."[1]

3. Where a ship is the property of the Crown, no action *in rem* or otherwise for salvage can be maintained. The only mode in which an application can be made to the Crown in respect of contractual rights is that which is provided by statute.

LORD CHANCELLOR, page 504:—If the proprietary right was in the Crown, the matter before their Lordships is reduced to one of these propositions of law which are almost beyond the reach of argument. The question had been discussed in the Courts for a very long period, and after catena of authorities that have been brought before their Lordships, it is vain to argue that, where the property belongs to the Crown, the Crown can be impleaded, whether in this form or in another form. Where you are dealing with an action *in rem* for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner, and if the owner is the King the action cannot be maintained, since it is impossible to contend that the King can be impleaded in his own Courts. The only mode in which application can be made to the Crown in respect of contractual rights is that which is provided by statute. This is not one of the cases so provided for, and it is, therefore, impossible to maintain that the power of seizing a vessel belonging to the Crown can be exercised as against the Crown.

SCHOOLS.

COMMON SCHOOL FUND.

ATTORNEY GENERAL FOR ONTARIO v. ATTORNEY GENERAL FOR QUEBEC.[2]

1. By agreement of submission dated April 10, 1893, the provinces of Ontario and Quebec referred to a statutory tribunal "the ascertainment and determination of the amount of the principal of the common School Fund and the method of com-

1 Newfoundland, aff., 16th July, 1903, L. R., 1903, App. Cas., 501.
2 Quebec, Supr. C., rev., 12th November, 1902, L. R., 1903, App. Cas., 39.

puting" interest thereon, and of the amount for which Ontario was liable. That fund was established by Canadian Act (12 Vict., c. 200), and consisted *inter alia* of the proceeds of public lands received by Ontario and paid to the Dominion.

2. It was held that a claim by Quebec that Ontario should be debited with uncollected prices of lands sold by it, being a claim for wilful neglect and default and in the nature of damages, not suggested in but heterogeneous to the matters actually specified in the submission, was not on its true construction included therein.

QUALIFIED TEACHERS.

THE BROTHERS OF THE CHRISTIAN SCHOOLS ET AL. v. THE MINISTER OF EDUCATION OF ONTARIO ET AL.[1]

3. The members of the religious communities known as "the Brothers of the Christian Schools" and "the Grey Nuns," who became members after the passing of the British North America Act, 1867, and who have not received certificates of qualification to teach in the public elementary schools of Ontario, are not to be considered as qualified teachers for the purposes of the Separate Schools Act of Ontario.

See LEGISLATURE: *Education. Public Schools.*

SEIGNIORY.

RECOGNITION BY STATUTE.

LABRADOR COMPANY v. THE QUEEN.[2]

1. The recognition of a seigniory made by the Legislature, even by mistake, is conclusive of the existence of a seigniory belonging to the appellant, and the schedule under the Seigniorial Act makes evidence as to the boundaries of such seigniory.

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1 Ontario, aff., 2nd November, 1906. 23 L. J. R., 29: L. R., 1907. App. Cas., 69.

2 Quebec, aff., 19th November, 1892. 62 L. J. R., n.s., 33.

SERVITUDE.

RIGHT TO SUPPORT LAND.

TRINIDAD ASPHALT COMPANY v. ORMBARD.[1]

1. The right of support from adjacent land which will keep the surface from subsidence still exists, though the land supported consists of asphaltum, for the nature of the strata is an immaterial consideration.

LORD MACNAGHTEN, page 117:—Water dropping from the clouds on the face of the earth and percolating the ground in no definite channel is not the property of any man until it has been appropriated. The pitch which is the peculiar product of this strip of land in the Island of Trinidad resembles water in one respect. At a certain temperature it becomes liquid. When it is liquid its behaviour is more or less like the behaviour of water or any other fluid. It has no angle of repose. From these premises Nathan, J., infers that this underground stratum of pitch is no man's property until it has been appropriated, and his conclusion is that just as no action will lie for collecting or pumping up underground water percolating the earth in no defined channel, though the supply may be withdrawn from a neighbour's property, and the withdrawal may leave his well dry and useless, so anybody and everybody who owns a lot in the village of La Brea may, with impunity, win the pitch lying under his neighbour's land. So far the two learned Puisne judges were agreed. They differed only on one point. Nathan, J., thought that it was decided that an owner of land has no right at common law to the support of subterranean water. That is the head note in *Popplewell & Hodkinson.*[2] Lewis, J., thought that the head note was not warranted by the decision. Nathan, J., therefore, came to the conclusion that the plaintiffs had no case at all, while Lewis, J., thought they were right up to a certain point and gave them a barren victory.

The judgment of the learned Chief Justice is short and to the point. The argument which Nathan, J., has elaborated with much ingenuity and learning is dealt with by anticipation in a single sentence. "Asphaltum," observes the Chief Justice, "is a mineral—not water." He found that the defendants had interfered with the plaintiffs' right of support, that they had laid down the surface of the plaintiffs' land, and consequently done injury to the plaintiffs' house, and also that the plaintiffs had suffered injury by the loss of the asphaltum which, on the removal by the defendants

1 Trinidad, rev., 1899, 48 W. Rep., 116.
2 17 W. R., 806, L. R., 4 Ex., 248.

of the lateral support of their land, passed into the defendants' land and was appropriated by them to their own use.

Their Lordships agree with the learned Chief Justice. It is not necessary to discuss the question on which Lewis, J., differed from Nathan, J., as to the right of support from subterranean water, because, as the Chief Justice observed, the substance which afforded support in this case was not water. As was laid down by the Court of Queen's Bench in *Humphries* v. *Brogden*,[1] the nature of the strata must be immaterial; it is impossible for the court to measure out degrees to which the right of support for the surface may extend. "The only reasonable support," as Lord Campbell observed, "is that which will protect the surface from subsidence and keep it securely at its ancient and natural level." The damages awarded by the Chief Justice do not appear to their Lordships to have been assessed on a wrong principle, or, under the circumstances, to be excessive.

SHIP AND SHIPPING.

CUSTOMS DUTY.

ALGOMA CENTRAL RAILWAY v. THE KING.[2]

1. A foreign built ship bought in the United States and brought to Canada is liable to the duty imposed by the Canadian Customs Tariff Act, 1897, s. 4, sched. A, item 409.

LORD MACNAGHTEN, page 480:—Several difficulties have been suggested. In the first place, it is said that ships are not "goods." It is not necessary to refer to or discuss the language of the Canadian Customs Act, because the Customs Tariff, 1897, itself places "ships in the schedule or list of goods subject to duty." Secondly, it was argued that ships could not be "imported" into a country. It is not easy to understand that argument; this ship was brought into Canada. Nothing more can be required to satisfy the word "imported." In the next place, a difficulty was suggested with regard to the words "application for Canadian register" in item 409, the contention being that there had been no such application. Their Lordships agree with the Supreme Court in thinking that, as there was no such thing as an independent Canadian register in existence, the words must necessarily mean application for British register in Canada.

Lastly it was urged that the enactment in question is repugnant to the provisions of the Imperial Merchant Shipping Act, 1894, (57-58 Vict., c. 60). Their Lordships are unable to see any repugnancy. The duty is a duty imposed on goods imported and it

1 12 Q. B., 739.

2 Canada, Supr. C., aff., 16th July, 1903, L. R., 1903, App. Cas., 478; 72 L. J. R., n.s., 108; 19 T. L. R., 623.

is to be collected at the time when the application for registration is made; but payment of the duty is not made a condition of registration.

SEAWORTHINESS.

2. *See* the remarks of Lord Herschell in *Hadley* v. *Pinkey & Sons* Steamship Co.[1]

SEIZURE OF SHIP.

SHIP "KITTY" v. THE KING.[2]

3. An American vessel was seized by a Canadian cruiser for fishing on the Canadian side of Lake Erie. The Crown brought an action to have her declared forfeited. The local Judge in Admiralty came to the conclusion upon the evidence that the vessel was not in Canadian waters and ordered her to be restored to her owners. The Supreme Court of Canada, Taschereau C.J., dissenting, reversed this judgment and condemned the vessel.

4. It was held that the judgment of the Supreme Court[3] must be reversed and the judgment of the local Judge in Admiralty restored.

See COLLISION:

STATUTES.

ALLOWANCE.

ATTORNEY GENERAL OF NEW SOUTH WALES v. RENNIE.[4]

1. A colonial statute gave an allowance to "every member of the Legislative Assembly now serving or hereafter to serve therein" to be paid as therein provided to "every such member of this present Legislative Assembly now serving....and.... hereafter elected."

2. This statute applied generally to the Legislative Assembly, which was an essential part of the Constitution of the Colony, and was limited to the Assembly which was in existence at the time that it was passed.

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1 L. R., 1894, App. Cas., 227.
2 Canada, Supr. C., rev., 21st December, 1905, 22 T. L. R., 191.
3 34 Sup. C. Rep., 673.
4 New South Wales, aff., 9th May, 1896, 74 L. T. R., p. 532.

CONSTRUCT AND MAINTAIN.

WEST INDIA IMPROVEMENT CO. v. ATTORNEY GENERAL OF JAMAICA.[1]

3. Where the legislature imposes upon the promotors of an undertaking an obligation to construct and maintain work, they must bear the cost of construction and maintenance in absence of provision to the contrary.

CONSTRUCTION.

MONTREAL GAS CO. v. CADIEUX.[2]

4. By the true construction of sect. 20 of the Canada Act (12 Vict., ch. 183), borrowed from the Gasworks Clauses Act, 1847 (Imperial Parliament), the appellant company is authorized to cease supplying the respondent with gas at any of his houses on his neglect to pay its bill for any one of them. There is nothing in the section to limit the authority of the company to the particular building in respect of which there has been default, and such a limitation cannot be implied.

DOMINION OF CANADA STATUTES.

GRAND TRUNK RAILWAY CO. v. WASHINGTON.[3]

5. In Canada, provincial statutes cannot be looked at in deciding questions arising upon the construction of Dominion Statutes.

DUTY ON STEEL RAILS.

TORONTO RAILWAY CO. v. THE QUEEN.[4]

6. The only distinction made by the Canadian Act 50 & 51 Vict., c. 39, between taxed and free steel rails for railways is that of weight, and all rails above the specified weight are exempted from duty.

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1 Jamaica, aff., 16th December, 1893, 70 L. T. R., p. 80.
2 Supr. C., Canada, 28th July, 1899, L. R., 1899, App. Cas., 589.
3 Canada Supr. C., rev., 24th February, 1899, 8 L. T. R., p. 301.
4 Canada, Supr. C., Ontario, rev., 31st July, 1896, 75 L. T. R., p. 234.

EFFECT OF GENERAL LEGISLATION.

ESQUIMAULT WATER-WORKS CO. v. CITY OF VICTORIA CORPORATION.[1]

7. Private Acts conferring special rights and imposing special obligations for special purposes are not overruled by general legislation the application of which might interfere with the rights granted and the obligations imposed by the private Acts.

8. By section 2 of the British Columbia Water Clauses Consolidation Act, 1897, "Unrecorded water shall mean all water ....not held under or used in accordance with a record under this Act, or under the Acts repealed hereby....and shall include all water for the time being unappropriated or unoccupied or not used for a beneficial purpose:"—

9. Held that water which has been ascertained and appropriated and by private Acts vested in a corporation for the discharge of obligations which might on due notice be imposed upon the corporation, but have not yet been imposed, is not "unrecorded water" within the meaning of the Act.

EFFECT OF IMPERIAL STATUTE.

CALLENDER ET AL. v. THE COLONIAL SECRETARY OF LAGOS ET AL.[2]

10. If the scope and object of an Imperial statute leads to the conclusion that the Legislature intended it to affect a colony, and the words used are calculated to have that effect, they must be so construed.

EXCLUSION.

SMYTH v. THE QUEEN.[3]

11. Where an Act of Parliament, *ex majore cautela* or otherwise, excludes in plain language from the operation of the Act a class of persons to whom its provisions do not appear to be applicable, such exclusion cannot be held to apply to another class of persons not expressly named.

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1 British Columbia, 1907, rev., 76 L. J., n.s., 75; L. R., 1907, App. Cas., 499.
2 Lagos, rev., 11th July, 1891, 60 L. J. R., n.s., 33.
3 Victoria, rev., 3rd August, 1898, 79 L. T. R., p. 199.

EXPROPRIATION.

COMMISSIONERS OF PUBLIC WORKS v. LOGAN.[1]

12. It is a sound canon of construction that an intention to take away property without compensation should not be imputed to a legislature unless it be expressed in unequivocal terms.

13. Where it appears that road commissioners claimed to expropriate without compensation the respondent's land for railway purposes on the ground that s. 11 of Act IX. of 1858 effect a transfer to them of the rights derived by the Government from the proclamation of 1813, and extended those rights so as to be applicable to the present case.

14. Section 11 must receive a strict construction. Its language was satisfied by the transfer of the existing powers without any extension thereof. It would require a more direct expression of intention to create such any new power of expropriation for railway purposes without compensation as was claimed.

LORD DAVEY, page 363:—But their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognized by the Courts of this country as a canon of construction and was approved and acted on by Lord Watson in delivering the judgment of this Board in *Western Countries Ry. Co.* v. *Windsor and Annapolis Ry. Co.*[2]

EXTENSION OF LINE OF RAILWAY.

MUNICIPAL COUNCIL OF SHANGHAI v. MCMURRAY.[3]

15. The power to take lands for the extension of the lines of a railway laid down as means of communication is not limited to the prolongation of existing lines of road in the same direction, but extends to new roads branching off laterally from existing roads.

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1 Cape of Good Hope, aff., 12th June, 1903, L. R., 1903, App. Cas., 355.
2 7 App. Cas., 188.
3 China and Japan, rev., 17th February, 1900, 82 L. T. R., 101.

GENERALIA SPECIALIBUS NON DEROGANT.

BARKER v. EDGER ET AL.[1]

16. Where the Legislature has given attention to a special subject, and has provided for it, it cannot be presumed that a subsequent general enactment is intended to interfere with the special provision, unless that intention is very clearly manifested.

INCOME.

ATTORNEY GENERAL OF BRITISH COLUMBIA v. OSTRUM.[2]

17. On the true construction of the British Columbia Assessment Act (R.S. c. 179), the word "income" includes all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation.

LORD MACNAGHTEN, page 147:—Their Lordships are of opinion that there is no ground for cutting down the plain and ordinary meaning of the word "income." In their view the expression was intended to include, and does include, all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation.

The learned judges in the full Court seem to have held that nothing was to be regarded as "income" for the purpose of taxation, but what was actually "received, gained, or granted." "It is quite possible," said Drake, J., who gave the leading judgment, "that an income tax could be imposed upon personal earnings which have been received; but in my opinion," he added, "it cannot be imposed on unascertained earnings in the nature of wages, because it is not income until it is earned." But then the scheme of the Assessment Act and of every other income tax Act with which their Lordships are familiar is to provide for the collection of the tax on the basis of the gains and profits of an earlier period. The scheme is plain enough. The province is to be divided into districts. For each district an assessor is to be appointed. The duty of the assessor is to make up the assessment roll in each year. Everybody, when required, is to make returns of his property or the section relating to returns (sec. 32 c), is, "income whether derivable from salary or otherwise,"—an expression which seems

1 New Zealand, rev., 3rd August, 1898, 79 L. T. R., p. 151; 67 L. J. R., n.s., 115.

2 British Columbia, rev., 25th November, 1903, L .R., 1904, App. Cas., 144.

to comprehend every possible source of income. Then every assessor is to begin to make up his roll in each year not later t. an July 10, and to complete it on or before November 1; and, lastly, the Act provides that "in each year the taxes shall be deemed to be due and collected under the roll revised during the previous year" (sec. 78), and that "the taxes assessed, levied, and collected under the Act shall be deemed to be due and payable on the second day of January in each year." (Sec. 79). The conclusion at which their Lordships have arrived, is that the language of the section in the Assessment Act imposing a tax on income is clear and unambiguous, and that no ambiguity is introduced by the language of the section relating to returns. Their Lordships desire to add that in construin ; this Act, no assistance, in their opinion, is to be obtained from d cisions or dicta turning on expressions found in the English Bankruptcy Act. The language is not the same, and the scope of the enactment is widely different.

INTEREST.

TORONTO RAILWAY v. TORONTO CORPORATION.[1]

18. The Ontario Judicature Act (Revised Statutes of Ontario, 1897, c. 51, s. 113), enacts that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it:—"

19. Under the true construction of this section it is incumbent upon the Court to allow interest for such time and at such rate as it may think right in all cases where a just payment has been improperly withheld, and compensation therefor seems fair and equitable.

PROTECTION CLAUSE.

MCLAUGHLIN v. WESTGARTH ET AL.[2]

20. In the construction of statutes it is not to be assumed that all persons not specifically included in a protecting clause are for that reason alone excluded from the protection of the statute.

EARL OF HALSBURY, page 832:—The misfortune in the framing of those statutes is that any body of persons, seeing a possibility of

1 Ontario, aff., 8th November, 1905, L. R., 1906, App. Cas., p. 117.
2 New South Wales, aff., 17th May, 1906, 94 L. T. R., p. 831; 75 L. J., n.s., 117.

liability on their part, apply to Parliament to have special provisions inserted for their protection. That application is occasionally complied with, and then the argument is raised which their Lordships have heard to-day, namely, that anybody who is not included in the enumeration of the particular persons so inserted must be taken to be excluded by the operation of the statute from protection, just because they are not included, and others are. The doctrine applicable to all such cases is that a great many things are put into a statute *ex abundanti cautela*, and it is not to be assumed that anybody not specifically included is for that reason alone excluded from the protection of the statute. Their Lordships, however, state this general position rather in view of the construction of statutes in general than as being specially relevant to this particular case.

RETROACTIVE EFFECT.

YOUNG v. ADAMS.[1]

21. Retroactive effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language.

22. The New South Wales Act (59 Vict., c. 25, s. 58), which enacts that "Nothing in this Act or in the Civil Service Act of 1884 shall be construed or held to abrogate and restrict the right of the Crown as it existed before the passing of the said Civil Service Act to dispense with the services of any persons employed in the public service," is not retrospective in its operations:

23. So, it was held that the respondent, who had been dismissed from the public service before the said Act came into operation, but not in the manner prescribed by the Act of 1884, was not affected by the provisions of the later Act, which only apply to persons actually employed in the public service at and after the date thereof.

LORD WATSON, page 475:—Their Lordships are unable to discover the least analogy between the enactments which require to be construed in this appeal and those which were under the consideration of the Court in *Rex* v. *Inhabitants of Dursley*,[2] and in *Attorney-General* v. *Theobald*,[3] which were much relied on in appellant's argument. It does not seem to be very probable that the

1 New South Wales, aff., 29th April, 1898, L. R. 1898, App. Cas., 469; 67 L. J. R., n.s., 75.
2 3 B. & Ad., 465.
3 242 B. D., 557.

Legislature should intend to extinguish, by means of retrospective enactment, rights and enactments which might have already vested in a very limited class of persons, consisting, so far as appears, of one individual, namely, the respondent. In such cases their Lordships are of opinion that the rule laid down by Erle, C. J. in *Midland Ry. Co. v. Pye*,[1] ought to apply. They think that, in a case like the present, the learned Chief Justice was right in saying that a retrospective operation ought not be given to the statute, "unless the intention of the Legislature that it should be construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. The ratio is equally apparent when a new enactment is said to convert an act wrongfully done at the time into a legal act, and to deprive the person injured of the remedy which the law then gave him.

RIGHTS GIVEN BY LEGISLATURE.

CANADIAN PACIFIC RAILWAY v. PARKE.[2]

24. Wherever, according to the construction of a statute, the Legislature has authorized a proprietor to make a particular use of his land, that is, in this case, to irrigate land from external sources, and the authority given is in the strict sense of law, permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law rights of others.

LORD WATSON, page 545:—The leading authority in the law of England, upon this question, which, though not numerous, are of considerable weight, are *Managers of Metropolitan Asylums District v. Hill*,[3] and *London, Brighton, and South Coast Railway Co. v. Truman*.[4] In the first of these cases the managers were authorized by a public statute, 30 and 31 Vict., cap. 6, no locality being specified, to erect hospitals for the reception of the sick poor of the metropolis. In virtue of these statutory powers, they commenced the erection of a small-pox hospital at Hampstead, when an injunction was applied for the respondents who were the proprietors of houses in vicinity. At the trial, it was found by a jury that the hospital was, or would be, to the nuisance of the respondents. The House of Lords decided in favour of the respondents upon the express grounds that the statute was permissive and gave the managers no authority to erect a hospital which was injurious

1 10 C. B., n.s., 191.
2 Canada, Supr. C., British Columbia, rev., 17th June, 1899, L. R., 1899, App. Cas., 535; 68 L. J. R., n.s., 89; 48 W. R., 118.
3 29 W. R., 617; 6 App. Cas., 193.
4 34 W. R., 657; II. App. Cas., 45.

to neighbouring proprietors. The Lord Chancellor (Selborne) said[1]: "I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the plaintiffs without their consent." In the same case,[2] Lord Blackburn said: "It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private right of individuals, to show that by express words, or by necessary implication such an intention appears." The noble and learned judge also observed (at p. 203): "The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and, if no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was not that the thing should be done at all events, but only that it should be done, if it could be done without injury to others.

In the second case, a railway company were empowered by a local and personal act, passed after due inquiry, to purchase additional lands not exceeding fifty acres, for the purposes *inter alia* of receiving, depositing or keeping any cattle or any goods conveyed or intended to be conveyed on the railway. They were required by the Act to sell superfluous lands within ten years from its passing. Under that power they purchased between two and three acres of ground adjacent to one of their stations. For nearly ten years the ground was used as a market garden, when the company devoted the land to the purposes of their cattle traffic and constructed a yard or dock for the cattle carried by them. Certain occupiers of houses in the neighbourhood of the yard who complained of it as constituting a nuisance, but did not allege negligence on the part of the company in using it, applied for an injunction which was granted by North, J., and his decision was affirmed by the Court of Appeal. Their decisions were reversed by the House of Lords, who held that the provisions of the Act which related to the acquisition and use of the yard, were intended by the Legislature to be imperative in the same sense as its provisions relating to the use of the railway, and that no negligence having been shown on the part of the company, the injunction ought to be refused.

RIGHT OF PRIVATE CITIZEN.

JOHNSTON ET AL. v. CONSUMERS GAS COMPANY.[3]

25. Where an Act of Parliament provided that, under certain circumstances, the price of gas supplied to a city by a gas company should be reduced, and empowered the corporation

1 6 App. Cas., p. 202.
2 6 App. Cas., 208.
3 Ontario, aff., 1st April, 1898. 78 L. T. R., p. 270.

of the city to check the annual audit of the company's accounts and ascertain whether they were complying with the Act.

26. A private consumer had no right to bring an action to recover an overcharge alleged to have been made contrary to the provisions of the statute.

SAVING OF RIGHTS.

ABBOTT v. MINISTER FOR LANDS.[1]

27. Where a statute repeals a previous statute, with a reservation of "all right accrued" under such repealed statute, the mere right existing in any person to take advantage of the repealed enactment without any act done towards availing himself of that right cannot be deemed a "right accrued" within the meaning of the reservation.

TARIFF ACT.

CANADA SUGAR REFINING CO. v. REGINA.[2]

28. By the true construction of the Customs Tariff Act, 1894, s. 4, as amended by the Tariff Act, 1895, which in effect directs that duty be paid upon raw sugar "when such goods are imported into Canada or taken out of warehouse for consumption therein," the date at which duty both attaches thereto and becomes payable is when the goods are landed and delivered to the importer or to his order, or, when they are taken out of warehouse, if instead of being delivered they have been placed in bond.

29. Section 150 of the Customs Act, 1886, which directs that the precise time when "they came within the limits of the port at which the goods are to be landed"—that is, where the effective report is to be made. Such construction are required in order to place a consistent, rational, and probable meaning on the context and other clauses of the Act.

TARIFF FOR ELECTRICITY.

ATTORNEY GENERAL FOR VICTORIA v. MELBOURNE CORPORATION.[3]

30. Provisions in an Act of Parliament regulating the supply of electricity which require uniformity of treatment to-

1 New South Wales, aff., 30th March, 1895, 72 L. T. R., p. 4[illegible]; 64 L. J. R., n.s., 167. —
2 Canada, Supr. C., aff., 27th July, 1898, App. Cas., 735.
3 Victoria, 1907, aff., 76 L. J., n.s., 91; L. R. 1907, App. Cas., p. 469.

wards all classes of customers are not inconsistent with the existence of two systems of charge, either of which every customer is free to adopt.

WORDS HAVING TWO MEANINGS.

SIMMS ET AL. v. REGISTRAR OF PROBATES.[1]

31. Where the words of an Act of Parliament are susceptible of two meanings, each adequately satisfying the language, and great harshness is produced by one of them, circumstance has legitimate influence in inclining a court to adopt the other.

See GAS: *Charter of Montreal Gas Company;* DAMAGES: *Powers given by Legislature*; EMPLOYER AND WORKMAN; *Legislature*: *Construction*; SEIGNIORY: *Recognition by statute.*

STOCK TRANSACTIONS.

See EVIDENCE, GAMING AND WAGERING.

STORAGE.

ACQUIESCENCE IN DEFAULT OF STOREHOUSE.

BRABANT ET AL. v. KING.[2]

1. A depositor of goods for safe custody, who, by himself or his servants has had an opportunity of observing certain defects in the storehouse, cannot be taken to have agreed, that any risk of injury to his goods which may possibly be occasioned by such defects should be borne by himself and not by his bailee.

LORD WATSON, page 788:—It would be a very dangerous doctrine for which there is not a vestige of authority to hold that a depositor of goods for safe custody, who, by himself or his servants has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which may possibly be occasioned by those defects, should be borne by him and not by his paid bailee. The authorities relating to the vexed maxim: *Volenti non fit injuria,* have no bearing whatever upon the point. From the very nature of the transaction the depositor was entitled to rely upon the care and skill of his bailee. The duty was incumbent upon the latter in the due fulfilment of his contract of considering whether his premises would be safely

1 South Australia, rev., 6th April, 1900, 82 L. T. R., 433.
2 Queensland, rev., 29th June, 1895, 72 L. T. R., n.s., p. 785.

used for the storage of explosives or other goods and if they could not take immediate steps for placing the goods in a position of safety.

STREET.

RELIGIOUS PROCESSIONS.

SADACOPA CHARIAR ET AL. v. KRISHNAMOORTHY ET AL.[1]

1. All members of the public have equal rights in streets which are vested in the local authority, and therefore one religious sect has no right to prohibit another religious sect from conducting religious processions in the streets.

See CORPORATION (*Municipal*); *Public Street, Use of.*

STREET RAILWAY.

EXCLUSIVE RIGHT TO STREET.

WINNIPEG STREET RAILWAY v. WINNIPEG ELECTRIC STREET RAILWAY.[2]

1. The words in an Act "to use and occupy any and such "parts of any of the streets and highways, as may be required "for the purposes of their railway track, the laying of the rails, "and the running of their cars and carriages" conferred no exclusive right upon the appellants to the use of the streets of the city, but that the city authorities could validly grant to the respondent company a right to lay down street railways in streets already worked by the railway of the appellants, and also in streets not worked by them which they were nevertheless willing to work.

LIABILITY FOR LICENSES.

MELBOURNE STREET RAILWAY AND OMNIBUS COMPANY v. KIDNEY.[3]

2. A tramway "trust" leased a tramway for an agreed rent to the appellant company, who were the owners of the cars running on it, and the employers of the drivers and conductors. The lease contained a clause providing that "The company shall be liable to no other payment to the trust .... for portion of profits or otherwise howsoever except for municipal rates."

1 Madras, aff., 21st March, 1907, 23 L. T. R., 402.
2 Manitoba, aff., 30th June, 1894, 71 L. T. R., 127; 64 L .J. R., n.s., 10.
3 Victoria, aff., 12th April, 1905, 92 L. T. R., 554.

3. This did not exempt the company from the liability to pay license duties lawfully imposed under statutory powers.

SUPROGATION.

See INSURANCE, (*Fire*): *Eod. vis.*

SUBSTITUTION.

DEMURRER OF

DE HERTEL v. GODDARD ET AL.[1]

1. By article 932 of the Civil Code of Lower Canada, substitutions created by will cannot extend to more than two degrees, exclusive of the institute.

2. A testator, by his will, left property to K. for life, and after her death to M., A., "conjointly and in equal shares" for life, and after their decease to their children "share and share alike," and "if two of three persons M., A., and T., shall die without children of the survivor," with a give over in the event of all the three dying without children.

3. M. and A. died without children. T. survived and left one child, through whom the respondents claimed.

4. This will contains only two degrees of substitution, and the divise did not come within the prohibition in art. 932 of the Civil Code.

LORD MACNAGHTEN, page 114:—It was not disputed that the French law in force in the province at the time of the cession of the country prohibited more than three degrees in substitutions created by will. The law as declared in the Civil Code of Lower Canada is to the same effect. Article 932 provides that substitutions created by will "cannot extend to more than two degrees exclusive of the institue." That article, however, appears to be marked as new law. And the learned counsel for the respondents intimates that they were prepared to argue that at the time that the will came into operation there was no restriction on the number of degrees in substitutions created by will. The contention which they proposed to raise was that during the interval between the commencement of the Act of 1801,[2] when the Civil Code came into force, there was unlimited freedom of disposition by will. But their Lordships do not think it necessary to embark on so far-reaching an inquiry in the present case. Assuming, for argument, that only three degrees of substitution were permissible by law at the time that the testator's will came into operation, how many

1 Quebec, aff., 31st July, 1897; 77 L. T. R., p. 113; 66 L. J. R., n.s., 20.
2 41 Geo. 3, c. 4, and August 1st, 1866.

degrees are to be reckoned in the transmission of the estate from the testator to Alfred Edward Roe in regard to the share of Mary Robertson. From Katharine Robertson the institue to Mary Robertson to A. E. Roe apparently is no more than one degree. The learned counsel for the appellant, however, discovered another degree in the interval between the death of Mary Robertson without issue and the opening of the succession in favour of A. E. Roe. They contended that on the death of Mary Robertson without issue, the share given to her for life passed by tacit substitution to Amelia Robertson and Mary Elizabeth Tunstall in equal shares. It is certainly not unusual in the case of a gift to a class, the members of which are to take for life with remainder to their children, to find the benefit of survivorship attached to the gift in the event of one or more of the members of the class dying without issue. Often that is a very proper provision. It was one likely enough to commend itself to a person about to dispose of his property by will if he did not defeat or interfere with some object which he had in vie . But you cannot introduce it by mere conjecture. There must be either express declaration or necessary implication. Here, there is neither the one nor the other. The case is very different from those cases on English wills to which Mr. Blake referred, where cross remainders must be implied in order to effectuate the testator's declared intention that the estate was to go over in its entirety. Here the appellant desired that the share given to Mary Robertson should, in the course of its devolution, pass to the other two ladies in order that that portion of the estate might reach its destination. There were two roads. One was blocked by the law, which said that the journey must not be completed at all. Neither expressly, nor yet by implication, did the testator direct that road to be taken. The other fulfills all the conditions of the will. No doubt it involves a halt at one point of the journey, but it creates no difficulty. There is no intestacy. The law itself provides for the interval without suggesting that the provision was to count as a degree in the substitution. Article 963, which was admitted to be held law, declares that "If, by reason of a pending condition or some other disposition of the will, the opening of the substitution does not take place immediately upon the death of" Mary Robertson, who became institute in regard to the substitute who came next, "her h and legatees continue until the opening to exercise his rights, and remain liable for his obligations." In the course of the argument, some faint reliance was placed on the word "conjointly" in the gift to the three ladies as pointing to accretion. But the word "conjointly" is not inapplicable to a gift of property in equal shares so long as the property remains undivided. It might, perhaps, be inferred from the use of the word in the gift to the three, and its absence in the gift to their children that the testator desired to indicate that there was to be no partition before the property reached its final destination. However, that may be, the

word "conjointly" cannot neutralize or control the plain meaning of the words "in equal shares," by which it is immediately followed.

FIDEI-COMMISSARY SUBSTITUTION.

GALLIERS ET AL v. RYCROFT ET AL.[1]

5. The rule of Roman Law is that were a parent has appointed children or more remote descendants as heirs, and directed that upon their death their share should go over, such going over, or substitution, is subject to the implied condition that the deceased child left no issue.

6. This rule applies only in the case of fidei-commissary substitutions, and such a condition cannot be read into a will which merely substitutes one legatee for another in the event of the instituted legatee not entering on the legacy.

See WILL: *Substitution.*

SUCCESSION.

TAXES ON FOREIGN ESTATE.

LAMB v. MANUEL.[2]

1. The taxes imposed on movable property by the Quebec Succession Duty Act of 1892, and the amending Acts, apply only to property which the successor claims under or by virtue of Quebec law; and have no application to the several items in this case, which formed part of a succession devolving under the law of Ontario.

LORD MACNAGHTEN, page 72:—The decisions of the Quebec Courts are, in their Lordships' opinion, entirely in consonance with well-established principles, which have been recognized in England in the well known cases of *Thompson* v. *Advocate-General,*[3] and *Wallace* v. *Attorney-General,*[4] and by this Board in the case of *Harding* v. *Commissioners of Stamps for Queensland.*[5]

See TESTAMENTARY EXECUTORS: *Liability to be sued.*

SUNDAY.

See LEGISLATURE: *Lord's Day.*

SUPREME COURT OF CANADA.

See APPEAL: *From Supreme Court of Canada.*

1 Natal, rev., 3rd July, 1900, 83 L. T. R., 179; 69 L. J. R., n.s., 124.
2 Quebec, aff., 19th November, 1902, L. R., 1903, App. Cas., 68; 87 L. T. R., 460; 72 L. J. R., n.s., 17; 19 T. L. R., 68.
3 12 C. & F., 1.
4 L. R., 1 Ch., 1.
5 1898, App. Cas., 769.

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TAXATION.

See LEGISLATURE: *Direct Taxation.*

TEMPERANCE.

See LEGISLATURE: *Eod vo.*

TESTAMENTARY EXECUTORS.

LIABILITY TO BE SUED.

MOHAMADU ET AL v. PITCHEY.[1]

1. The rule laid down in the case of *Douglas* v. *Forrest*[2] that the creditor of a deceased debtor cannot sue the executor named in the will unless he has either administered or proved

1 Ceylon, rev., 9th June, 1894, 71 L. T. R., p. 99; 63 L. J. R., n.s., III.

2 4 Bing., 686.

the will refers to a grant of probate in due form by the proper court.

2. So action will not lie at the suit of creditor against a person named as executor who has only applied for probate and has proceeded no further in the matter, though the court has made an order that probate should be granted to him on his taking the usual oath of office.

TITLES.

CONSTRUCTION.

HARNE v. STRUDEN.[1]

1. In a grant of land with certain specified boundaries, as will further appear by the diagram framed by the surveyor:—

2. It was held that, as a matter of construction, where the diagram is repugnant to the terms of the grant, the latter will prevail.

3. Although by articles 8 and 13 of the Proclamation of August 6, 1813, there must be a diagram before a title be granted, yet the right of the grantee must be expressed in his title, and, when so expressed, will not be limited by the diagram.

TRADE MARK.

DESCRIPTIVE NAME.

MONTREAL LITHOGRAPHING CO. v. SABISTON.[2]

1. The appellant company, being the transferee of the assets and goodwill of the dissolved Sabiston Lithographic and Publishing Company, sued to restrain the respondent from carrying on business under the name of the "Sabiston Lithographing and Publishing Company," or any other name so framed as to lead to the belief that his business was in succession to that of the dissolved company.

2. It was held that the respondent has no right so to represent, but that there was no evidence that he had done so, and that the appellants were not entitled to an injunction against the mere use of the name.

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1 Cape of Good Hope, aff., 8th June, 1902, L. R., 1902, App. Cas., 454.
2 Quebec, aff., 8th July, 1899, L. R., 1899, App. Cas., 610; 81 L. T. R., 135; 68 L. J. R., n.s., 121.

EXCLUSIVE RIGHT TO NAME.

GRAND HOTEL COMPANY OF CALEDONIA SPRINGS v. WILSON.[1]

3. Where the mineral waters of the appellant derived from various Caledonia Springs, so called from being in a township of that name, acquired in the market the name of "Caledonia Water."

4. It was held in an action for an injunction, that the appellants had not, in the circumstances, a right to the exclusive use of the word "Caledonia." The respondents were entitled to indicate the local source of their waters and had sufficiently distinguished their goods from those of the appellants.

LORD DAVEY, page 111:—Their Lordships agree with what has been frequently said in these cases, that even a description of goods which is literally true may be so framed as to mislead, and they bear in mind the cases of which *Johnston* v. *Orr Ewing*[2] is an example, where a trade name or mark which would not mislead the dealer has been held an infringement, because it was calculated to mislead the retail purchaser.

NATIONAL STARCH MANUFACTURING COMPANY v. MUNN'S PATENT MAIZENA AND STARCH COMPANY.[3]

5. The Trade Marks Act, 1865 (New South Wales), by section 2 provides that a mark shall not be recognized or considered to be a trade mark of any person until the same is registered by or on behalf of any person claiming to be entitled thereto as his trade mark.

6. In the year 1856 the appellants invented a word as their trade mark for flour made from maize, and registered the trade mark in the United Kingdom and elsewhere, but they did not register the trade mark in the colony until 1889. The respondents and others used the words in Australia between 1864 and 1889.

7. It was held, that if the word was used during this period for the purpose of counterfeiting the appellants' goods, the right of the appellants to register it would not be impaired; but that if it was used as a descriptive term, and did not

1 Ontario, aff., 4th November, 1903, L. R., 1904 App. Cas., 103; 89 L. T. R., 456, 73 L. J. R., n.s., 1; 52 W. R., 286; 20 T. L. R., 19.
2 46 L. T. R., 216.
3 New South Wales, aff., 28th April, 1894, 63 L. J. R., n.s., 112.

denote such product to be the manufacture of a particular person, then it must be regarded as having become *publici juris* in the colony, and no longer registrable by the appellants.

INFRINGEMENT.

COCHRANE v. MACNISH ET AL.[1]

8. The use of the same name though in connection with a label which did not at all resemble the label used by the appellant was calculated to mislead and that the appellant was entitled to an injunction.

PARSONS v. GILLESPIE.[2]

9. Where the plaintiffs without relying on their registered trade-mark, which consisted in part of the term "Flaked Oatmeal," claimed that they had by use so intimately identified the term with their goods that the use of it by the defendants in their trade-mark had the effect of passing off their goods as the plaintiffs' goods:—

10. The term being one of ordinary and not exclusive description, and being applicable to the defendants' goods as well as the plaintiffs', and the defendants' thereof not having proved to have had or to be calculated to have the above effect, the suit must be dismissed with damages resulting from the grant of an interim injunction.

TRUST.

CONSTRUCTION OF TRUST DEED.

LONDON AND CANADIAN COMPANY ET AL v. DUGGAN.[3]

1. The respondent being the owner of certain shares in a company, transferred them to brokers as security for advances. The brokers raised loans upon the shares for their own accommodation, and transferred them to a bank, whose manager transferred them to the appellants. The transfer being as "manager in trust."

1 Jamaica, rev., 29th February, 1896, 74 L. T. R., p. 109; 65 L. J. R., n.s., 20.

2 New South Wales, aff., 15th December, 1897, L. R., 1898, App. Cas., 239; 67 L. J. R., n.s., 21; 14 T. L. R., 142.

3 Canada, Supr. C., rev., 22nd July, 1893; 63 L. J. R., n.s., 14; 9 T. L. R., 60.

2. Held, that these words mean in trust for the bank, and not a fiduciary relation to any other person, and were not so ambiguous as to cast on the appellants the duty of making enquiry.

WILLIAMS v. PAPWORTH ET AL.[1]

3. By a settlement, land was conveyed to trustees upon trust to raise an annuity during the lives of the children of S. and the life of the longest survivor, "to be applied for the maintenance and the education of such children or child as aforesaid."

4. It was held that the children took a joint interest in the annuity, but the shares of minors were to be applied for their maintenance and education.

CREATION OF

HARDOON v. BELISLIOS.[2]

5. Where the legal title to property is vested in one person and another person is the sole beneficial owner, nothing more is required to create the relation of trustee and *cestui que trust* between such persons.

6. The facts that there was never any contract between them, as vendor and purchaser or otherwise, that the *cestui que trust* did not create the trust or request the trustee to act for him, are immaterial.

7. Where the sole *cestui que trust* is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred in connection with trust property is not limited to that property.

TE TEIXA v. TE ROERA.[3]

8. The expression "to be held in trust" for a definite class of persons is not always sufficient to create an equitable right or obligation which can be enforced by legal proceedings.

NOTICE OF TRUST.

SIMPSON ET AL. v. MOLSONS BANK.[4]

9. Notice of a general trust created by a will is not notice of the terms of a particular trust affecting part of the testator's estate.

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1 New South Wales, aff., 21st July, 1900, 83 L. T. R., 184.
2 Hong Kong, rev., 8th December, 1900, 83 L. T. R., 573; 49 W. R., 209.
3 New Zealand, aff., 9th November, 1901, L. R., 1902, App. Cas., 56; 85 L. T. R., 558; 71 L. J. R., n.s., 11.
4 Quebec, aff., 23rd February, 1895, 64 L. J. R., n.s. 51

10. By the terms of their Act of Parliament the respondents were not to be bound to see to the execution of any trust affecting any of their shares:—

11. It was held that they were not liable for registering a transfer of shares executed in breach of trust by the executors, although they had notice that the shares were held in common with others by the transferers as executors for trust purpose and had a copy of the will in their possession, and although previous transfers of others of the testator's shares contained express reference to the trust of the will. The president of the bank was himself one of the executors, and the law agent of the executors was also the bank's law agent.

TRANSFER OF SHARES.

LONDON AND CANADIAN LOAN AND AGENCY COMPANY v. DUGGAN.[1]

12. Where the respondent had transferred shares as security for a loan, held, that the appellants, as derivative transferees from the lender, were not affected by a trust in favour of the respondent unless such trust was clearly disclosed on the face of their author's title, or was otherwise notified to them.

13. The words "manager in trust" appended to the signature of a bank manager imputed that he held and transferred the shares in trust for his employers, the bank, are not calculated to suggest that he stood in a fiduciary relation to some third person, so as to affect a transferee for value with constructive notice of such relationship.

See BANK AND BANKING: *Execution of Trust, Trust account*; SALE: *By Trustee*; WILL: *Trust by reference.*

TRUSTEE.

RESPONSIBILITY.

NATIONAL TRUSTEES COMPANY OF AUSTRALASIA v. GENERAL FINANCE COMPANY OF AUSTRALASIA.[2]

1. It is no answer to an action against a trustee for breach of trust that the trustee acted upon competent legal advice.

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1 Supr. C., rev., 29th July, 1893, L. R., 1893, App. Cas., 506.
2 Victoria, aff., 16th May, 1905, L. R., 1905, App. Cas., 373; 74 L. J. R., n.s., 73,; 21 T. L. R., 522; 54 W. R., 1.

2. Under the Victorian Trusts Act, 1901, s. 3 (corresponding with the English Act 59 & 60 Vict., c. 35), a trustee may be relieved from liability for breach of trust if he has acted honestly and reasonably, and ought fairly to be excused:—

3. The Judical Committee held, that by the true construction of this section, a trustee does not entitle himself to relief by proving that he has acted reasonably and honestly. He must shew that under all the circumstances he ought fairly to be excused for his breach of trust.

4. J. F. being entitled to the whole of his wife's proportion of a fund of which the appellants became trustees, assigned the same to the respondents. Under the erroneous advice of their solicitors, in accordance with an Act which was not passed till after the wife's death, the appellants paid two-thirds of the fund to the wife's children and one-third into the court under the Act for relief of trustees without question by the respondents, who accepted the appellants' statement as to their rights without verification. In a suit by the respondents to recover the said two-thirds:—

5. The decision was: 1. that the payment thereof to the children was a breach of trust, and that it was no defence that it had been made upon erroneous advice of the solicitors.

6. That the respondents having accepted and acted upon the appellants statement as to their rights was no evidence of acquiescence.

7. That although the appellants had acted honestly and reasonably they had shewn no title to be excused. They had made no attempt to replace the fund in whole or in part, nor explained the reason for their abstention. They were not gratuitous trustees, and could not throw upon the respondents, who where not in fault, the loss of a fund which they had misapplied in the course of their business.

LORD NORTH, page 379:—In *Doyle* v. *Blake*,[1] Lord Redesdale said: "I have no doubt that they" (the executors) "meant to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune;

1 2 Sch. & Lef., 231, at p 243.

but public policy requires that he should be the person to suffer." And there are many similar decisions in the books.

The appellants relied on the case of *Speight* v. *Gaunt*,[1] in which a trustee employed a broker to purchase certain securities for a trust. The broker said that he had done so, and produced a bought-note and asked for the money to complete as next day was pay day, and the trustee gave him the necessary cheques, which the broker misapplied. In a suit to make the trustee liable, it was held that the payment to the broker was made in the usual and regular course of business, and that the trustee was not liable; in other words, there was not any breach of trust. The present is a very different case.

Page 381:—The position of a joint stock company which undertakes to perform for reward services it can only perform through its agents, and which has been misled by those agents to misapply a fund under its charge, is widely different from that of a private person acting as gratuitous trustee. And without saying that the remedial provisions of the section should never be applied to a trustee in the position of the appellants, their Lordships think it is a circumstance to be taken into account, and they do not find here any fair excuse for the breach of trust, or any reason why the respondents, who have committed no fault, should lose their money to relieve the appellants, who have done a wrong and have denied the respondents' title. And that is not quite all. If trustees do unfortunately lose part of a trust fund by a breach of trust, the least that can be expected of them is that they should use their best endeavours to recover the fund, or so much thereof as is practicable, for their *cestuis que trust*. In the present case there seems to be some ground for thinking that other proceedings were open to the trust company by which any loss to them might have been averted, at any rate to some extent; but it does not appear that the trust company have taken any such steps, or made any attempt whatever to replace the fund or relieve the respondents from loss; nor have they condescended to give the Court any explanation or reason why they have abstained from doing so. It may be that the solicitors would be willing or might be compelled to make good the loss, if the trust company should find they cannot obtain relief elsewhere.

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1 9 App. Cas., 1.

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WAR.

See MARTIAL LAW: *State of war.*

WAREHOUSE RECEIPT.

NEGOTIABILITY.

TENNANT v. UNION BANK OF CANADA.[1]

1. Although warehouse receipts granted to itself by a firm which has not the custody of any goods but its own are not negotiable instruments within the meaning of the Mercantile Amendement Act, (c. 122 of the Revised Statutes), held, that the Dominion Act (46 Vict., c. 120), while it was in force dis-

1 Ontario, aff., 9th December, 1893, L. R., 1894, App. Cas., 31; 69 L. T. R., 774.

pensed with that limitation, validated such receipts and transferred to the indorsed thereof the property comprised therein:—

2. The Bank Act was *intra vires* of the Dominion Parliament.

3. Section, 91 sub-sect. 15, of the British North America Act, 1867, gives to the Parliament power to legislate over every transaction within the legitimate business of a Banker, notwithstanding that the exercise of such power interferes with property and civil rights in the Provinces (see sect. 92, sub-sect. 13), and confers upon a bank privileges as a lender which a provincial law does not recognize.

4. The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sect. 91, is of paramount authority even though it trenches upon the matter assigned to the provincial legislature by sect. 92.[1]

WATERCOURSE.

See Riparian Proprietor.

WILL.

ALTERNATIVE ABSOLUTE GIFTS.

McCormick v. Simpson.[2]

1. A testator gave to his widow his real estate for life, and at her death to his eldest son John for life, and thereafter to "become the absolute property of John's eldest son, alternatively, to become the property of my son, James or of his eldest son," and failing either of them to the appellant. John died in the testator's lifetime without male issue; James and his son who predeceased him survived the widow:—

2. Held that the gift to John's eldest son being of an absolute interest, it must, in the absence of words importing a different intention, and having regard to the context, be deemed to have been the intention of the will that the alternative gift to James should also be absolute.

3. The gift over to the appellant in case of the death of James without male issue was defeated if either James or his son lived to take absolutely.

1 Cushing v. Dupuis, 5 Appeal Cases, followed.
2 Quebec, 1907, aff., L. R., App. Cas., 1907, p. 494.

CAPACITY OF MIND.

PERERA v. PERERA.[1]

4. By the law of Ceylon a will may be executed as a notarial will and attested by a notary and two witnesses, "or if no notary shall be present," it may be executed as a non-notarial will, and attested by five witnesses.

5. The presence of a notary who is not acting in his notarial capacity does not vitiate the execution of a non-notarial will duly attested.

6. Where a testator was of sound mind when he gave instructions for his will, and an instrument prepared in accordance with those instructions was signed by him as his will, it is not necessary to show that he was capable of undertaking its provisions at the time of the signature.

LORD MACNAGHTEN, page 373:—The learned counsel for the appellant did not contend that the witnesses in support of the will were acting in conspiracy or saying what they knew to be false. He said that the will may have been and probably was read over to the testator, but that there was nothing to show that he followed the reading of the will or understood its meaning. He adopted the argument of Laurie, J., to the effect that it was not enough to prove that a testator was of sound mind when he gave instructions for his will, and that the instrument drawn in pursuance of the instructions was signed by him as his will, if it is not shown that he was capable of understanding its provisions at the time of signature. That, however, is not the law. In *Parker* v. *Felegate*,[2] Sir James Hannen lays down the law thus: "If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: "I gave my solicitor instructions to prepare a will, making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying out." Their Lordships think that the ruling of Sir James Hannen is good law as good sense. They could not therefore hold the will invalid, even if they were persuaded that Perera was unable to follow all the provisions of his will, when it was read over to him by Gooneratne's clerk.

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1 Ceylon, aff., 23rd March, 1901, 84 L. T. R., 371, 70 L. J. R., n.s., 46.
2 8 P. Div., 171.

ALLAN v. MORRISON ET AL.[1]

7. Where a will duly executed traced to the testator's possession and last seen there, is not forthcoming on his death? The presumption is that it was destroyed by himself; to rebut it there must be sufficient evidence that it was not destroyed by the testator *animo revocandi*; and held in his case that concurrent findings that it had not been rebutted could not be disturbed. There is a presumption against its fraudulent abstraction either before or after his death, but the circumstances which render such abstraction possible must be taken into account in arriving at the result of the evidence.

LORD DAVEY, page 610:—It was not denied that there is a presumption (to use the language of Lord Wensleydale in *Welch* v. *Phillips*[2]), "that if a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to rebut it." Whether this should be called a presumption of law or fact does not seem material. It may, of course, be rebutted, and (as said by Cockburn, C. J., in *Sugden* v. *Lord St. Leonards*[3]), "the presumption will be more or less strong, according to the character of the custody which the testator had over the will." But it was attempted to minimize the force of the presumption, and reference was made to the cases of *Harris* v. *Berrall*;[4] *Finch* v. *Finch*;[5] *Sprigge*.[6] In two of these cases the question was whether a will which was found mutilitated at the death of the testator, who had been insane for some time prior to his death, was entitled to probate, and it was held in the affirmative, Lord Penzance holding that the ordinary presumption, which he fully recognized, did not apply to such a case. It obviously does not, as the main question in such a case is whether the mutilation (assuming it to have been made by the testator) took place before or during the insanity. In *Finch* v. *Finch*,[6] the Court inferred from the facts proved that the will was in existence at the date of the testator's death. These cases have, therefore, nothing to do with the one before their Lordships.

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1 New Zealand, aff., 11th, J900, L. R., 1900, App. Cas., 604; 29 L. J. R., n.s., 141.

2 1836, 1 Moo., P. C., 299.

3 1 P. D., 154.

4 1 Sm. & Tr., 153.

5 L. R., 1 P. & M., 371.

6 L. R., 1 P. & M., 606.

ELDEST SON.

HARRIS ET AL. v. BROWN ET AL.[1]

8. A testator, by his will, directed that all his movable and immovable property should "descend in equal shares to the eldest son to be born" to each of the testator's two daughters; that the sons should, after their birth, remain under the guardianship of the executor of the will until they attained 21; and that whenever the eldest son of either of the daughters attained majority the executor should make over his share to him. After the testator's death a son was born to one of the daughters and died in infancy. There was no other issue to that daughter.

9. It was held that on the birth of the son the half-share became vested in him, and that on his death it passed to his father.

EVIDENCE IN PROBATE.

DONNELLY ET AL. v. BROUHTON.[2]

10. Where the shareholders of a company had passed a resolution for the voluntary winding up of the company, and execution was afterwards levied, at the suit of a judgment creditor, upon the goods of the company, the court has jurisdiction to stay proceedings in the execution before sale of the goods has been effected.

IN THE EVENT OF EITHER OF MY T[illegible] DYING BEFORE HIS BROTHER.

DUFFILL ET AL. v. DUFFILL.[3]

11. The testator, after dividing equally his residuary estate between his two sons, directed that "in the event of either of my two sons dying before his brother without legitimate issue, then his share shall become the property of his surviving brother; but if there are any legitimate children surviving their father, then" for their benefit as directed:—

12. It was held that the bequest created a vested interest in the sons, but one liable to be invested as to the son first dying (whether before or after the testator's death) in favour of the objects named in the clause of substitution.

1 Bengal, aff., 6th July, 1901, 17 T. L. R., 653.
2 New Zealand, aff., 4th July, 1891, 20 W. R., 208
3 Natal, rev., 7th July, 1903, L. R., 1903, App. Cas., 491; 89 L. T. R., 82; 22 L. J. R., n.s., 97; 19 T. L. R., 600.

INVESTMENTS.

WENTWORTH v. WENTWORTH.[1]

13. A testator devised his residue upon trust to convert with power to postpone conversion of twenty-one years, and with a direction that the surplus income and the unconverted estate during the twenty-one years and all accumulations thereof should go in augmentation of capital. The residue was settled on trusts for tenants for life and remainder-men. The trustees under powers in the will granted a mining lease, and retained the leased property unconverted for more than twenty-one years:—

14. The rents and royalties received under the mining lease during the twenty-one years ought to be invested, and the income therefrom ought to be invested and accumulated:—

15. And after the twenty-one years, the tenants for life of settled shares in the residue were entitled to receive out of the rents and royalties such annual sum as in the opinion of the Court would, under all the circumstances of the case, be a fair equivalent for the annual income that would have resulted if the estate had been converted.

LORD MACNAGHTEN, page 171:—In this country, in the case of income-producing property directed by will to be converted, but retained for a time unconverted for the benefit of the estate, it has been the practice of the Court to put a value on the property and to allow the trust for life out of the income actually produced a sum equal to four per cent. on such value. That was the rule laid down by Parker V. C., in *Meyer* v. *Simonsen*,[2] and followed by Lord Cairns in *Brown* v. *Gellatly*.[3]

LEGACY TO LESSEES.

KING v. RYMILL ET AL.[4]

16. A testator, by his will, left his real estate "to the lessees or holders of the present leases in the quantities, dimensions, and measurements set forth in their respective leases."

17. These words should not be confined to the original lessees, but included the assignees of the original leases.

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1 New South Wales, rev., 9th December, 1899, L. R., 1900, App. Cas., 163.

2 5 De G. & Sm., 723.

3 L. R., 2 Ch., 751.

4 South Australia, aff., 12th May, 1898, 78 L. T. R., p. 696; 67 L. J. R., n. s., 107.

MADE IN COLONIES.

MAYOR OF CANTON BEVY v. WYBURI ET AL.[1]

18. An English statute will not be held to make void a bequest made by a colonial will on the ground that it contravenes to local law of England without very clear ground appearing in such statute.

MEANING OF THE WORD "ISSUE."

EDYVEAN v. ARCHER BROOK.[2]

19. In a gift over on failure of the line of one child to "other of my children and their issue," the word issue must receive its plain and ordinary meaning, and not be restricted to the issue of children dying in the lifetime of the testatrix, unless the rest of the will plainly requires it.

20. The gift over in this case was subject to the condition that those only took under it which were also beneficiaries under the original gift, in which original gift issue was restricted as above by the immediate context: —

21. Held, that was insufficient by itself to control the meaning of the word used in a new connection. Accordingly the appellants were entitled to share in the said gift over an issue of a child whose line had failed; and this notwithstanding that under the original gift they had taken in substitution for their mother.

LORD MACNAGHTEN, page 5:—There are three grounds upon which it has been contended that their claim must be rejected. In the first place it is said that although they may be issue of one of the testatrix's other children in the ordinary sense of the word, yet they are not included in the term "issue" in the gift over, because they were not comprehended in the term "issue" in the original gift. That was the view of the full Court citing, and relying upon what was said by Lord St. Leonards in *Ridgeway* v. *Munkittrick*,[3] "It is a well settled rule of construction," said his Lordship, "never to put a different construction on the same word where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary." That dictum, asserted perhaps too positively as a general rule of construction, does not help one much in construing such a will as this. What is a clear intention?

1 Victoria, rev., 10th November, 1894, 71 L. T. R., n.s., p. 554.
2 Tasmania, 19th June, 1903, L. R., 1903, App. Cas., 379; 87 L. T. R., 4; 19 T. L. R., 6 .
3 Dr. & War .

That which is clear to one man is not always clear to another. A sounder or at any rate a safer rule is to be found in the observations of Knight Bruce, V. C., on the meaning of this very word "issue." "Before I can restrain that word," said the Vice-Chancellor, in *Head* v. *Randall*,[1] "from its legal and proper import, I must be satisfied that the contents of the will demonstrate the testator to have intended it in a restricted sense," and then he goes on to observe that the language of Lord Eldon, applied to property in *Church* v. *Mundy*,[2] might well be applied to persons in a case like that before him. Lord Eldon's words were these: "The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like demonstration plain to the contrary."

PROBATE.

KARUNARATNE v. FERDINANDUS.[3]

22. Words or clauses in a will ought not to be omitted from probate except upon evidence pointedly addressed thereto and shewing their improper insertion.

23. Where probate granted to the appellant had been revoked on issues which impugned the validity of the will as a whole, no issue having been raised or evidence given as to its partial validity, the Supreme Court in appeal varied the decree of revocation by declaring that the deceased died intestate as in this immovable property only and expunging from the will the reference thereto:—

24. It was held, on the evidence, that the revocation was right and that the appeal must be dismissed. There being no cross appeal as to the modification decreed, it was nevertheless pointed out by their Lordships that it ought not to have been made except as a compromise by consent.

REPRESENTATION.

GALLIEN ET AL. v. BYCROFT ET AL.[4]

25. A testator gave a life interest in his whole estate to his wife, and directed that after her death it should be equally divided among his children, or such of them as might then be alive.

26. Under this legacy neither the son nor the personal representative of a child who died in the lifetime of the widow was entitled to a share in the estate.

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1 2 Y. & C., 231, at p. 235.
2 15 Ves. Jun., 396, at p. 406.
3 Ceylon, 19th March, 1902, L. R., 1902, App. Cas., 405.
4 Natal, rev., 3rd July, 1900, 83 L. T. R., 179.

PENNY v. COMMISSIONERS FOR RAILWAYS.[1]

27. Where there is a devise to five persons nomination, or to such of them as should be living at the death of the testator's widow and attain twenty-one:—

28. It was held that all the devisees take vested interests in fee subject to be divested as regards each devisee dying in the lifetime of the widow in the favor of those (if any) who survive her and attain twenty-one.

29. But where later clauses gave to each devisee a specifically described portion of the land devised for life in the event of all the devisees surviving the widow, and declared that "in case of the death of any of the before-mentioned persons he gave and devised the share to which he would have been entitled" to his heir:—

30. Held, that the effect of this declaration was to alter the original devise, and to give the share of a devisee dying in the widow's lifetime to his heir, and not to the surviving devisees.

SUBSTITUTION.

BEAUDRY v. BARBEAU.[2]

31. A testator set apart a fund as a provision for his wife and also for his children until majority or marriage. He gave the residue of his estate to his children living at his death, and directed that it should be divided on the death of all of them. He further directed that from majority or marriage each of them was to receive the revenue derivable from his charge delivered to $6,000 a year, each child being charged with a substitution in favour of his or her children:—

32. It was held in a suit brought by the eldest son to recover arrears of his annuity of $6,000 a year, that according to the true intention of the testator as disclosed by the words of the will:—

33. The annuity of each child is a charge on the revenue of his own share and its arrears, not on the total revenue of the estate;

1 New South Wales, rev., 21st July, 1900. L. R., 1900, App. Cas., 628; 83 L. T. R., 182.

2 Quebec, aff., 28th July, 1900, L. R., 1900, App. Cas., 569; 83 L. T. R., 236; 69 L. J. R., n.s., 131.

34. Each child was entitled from the testator's death to an equal share of the net revenue current and accumulated, without regard to the benefits which during minority he receives from the fund set apart or under other clauses of the will;

35. The substitution is confined to the share of each child in the capital of the residue, and does not extend to the accumulation of its revenue.

SIR HENRY STRONG, page 575:—In interpreting a will the intention of the testator, which is to be arrived at solely from the language in which he has expressed himself, is, as Wurtele, J., has well observed, the only guide to be followed. Arguments derived from the assumption that the testator must have intended absolute equality in a disposition in favour of his children are unavailing and inadmissible so far as they are not in accord with the actual words in which the gift is expressed.

SURVIVORS AND SURVIVOR.

KING v. FREST.[1]

36. A testator devised a specified portion of his real estate and an equal share of the residue to each of his five sons for life, with remainder to his children, if more than one, as tenants in common in tail, with cross remainders between them, and declared that "in case any or either of my five sons shall depart this life without leaving any child or children him or them surviving, then I devise the shares of such son or sons unto and equally between the survivors and survivor of them my said sons and their respective heirs as tenants in common in tail.

37. The words "survivors and survivor" meant such of the sons as should be living at the death on which the disposition of the property was altered, and that on the death of survivor of the five sons without issue, his share of the residue was not disposed of by the will, but that the specifically devised property passed under the residuary devise.

TO THE ELDEST SON OF MY SISTER AND HIS HEIRS FOR EVER.

AMYOT v. DWARRIS.[2]

38. A gift "to the eldest son of my sister and his heirs for ever" operates in favour of the elder of her two sons living at

1 New South Wales, rev., 13th July, 1890, 60 L. J. R., n.s., 15.
2 Jamaica, rev., 4th February, 1904, L. R., 1904, App Cas., 268; 90 L. T. R., 102; 73 L. J. R., n.s., 40; 52 W. R., 16; 20 T. L. R., 269.

the date of the will, though he predeceased the testator in the absence of any contrary intention appearing in the context. As the gift lapsed on the death of the donee, there was an intestacy in favour of the heir at law.

LORD MACNAGHTEN, page 271:—The point raised on this appeal is a very short one, and in their Lordships' opinion, free from difficulty. The question, such as it is, turns on one passage in the will of Sir Fortunastus William Dwarris. After certain limitations which have failed or determined, he disposed of a property called Golden Grove, by giving it in these words: "To the eldest son of my sister, Frances McKeand Gibney, and his heirs for ever." It appears that at the time when the testor made his will, Mrs. Gibney had two sons. There was contention therefore at that time in existence a person answering the description of the "eldest son" of sister Frances. It was contended that the word "eldest" was not properly applicable to the elder of two persons, and that, if the testator had really meant Mrs. Gibney's first-born son, he would have said "elder," not "eldest." In their Lordships' opinion that objection savours of hypercriticism. If a man has two sons, and only two, the ordinary way of speaking of the first-born, if not designated by name, is to call him the eldest son of so-and-so. There being then a person in existence at the time answering the description in the will, their Lordships are of opinion that that person, though he died afterwards in the testator's lifetime was the object of the testator's bounty. There is nothing in the context to warrant any departure from the proper and ordinary meaning of the words employed.

All the authorities from *Lomax* v. *Holmden*,[1] to *Meredith* v. *Treffry*,[2] point in the same direction. The case of *Re Harris' Trust*,[3] on which the Appellate Court seems to place some reliance, cannot be regarded as an authority to the contrary. The learned Vice-Chancellor who decided that case was at the time of the decision under a misapprehension as to the operation of the Wills Act. He seems to have thought that with reference to the objects of testamentary bounty, the Act had an effect similar to that which it has "with reference to the real and personal estate comprised in it" (s. 94), an error afterwards corrected by the Court of Appeal in *Bullock* v. *Bennett*.[4]

TRUSTS BY REFERENCE.

MARY RUTH TSEN v. THE PERPETUAL TRUSTEE COMPANY.[5]

39. It is not a universal canon of construction that, where there is a trust by reference to a previous clause of a will, the

1 1749, 1 Vic. Sen., 290.
2 12 Ch. D., 170.
3 2 W. R., 689.
4 1855, 7 D. M., & G., 283.
5 New South Wales, 23rd February, 1895, 64 L. J. R., n.s., 49; 43 W. R. 636.

words declaring such trust should be simply re-written in such clause, merely substituting the second fund or property for the first. In most cases it is not reasonable so to make a duplication of trusts in the nature of charges.

LORD HOBHOUSE, page 49:—But, in the first place, their Lordships cannot accept the proposed canon of construction in any sense which would give to it the general effect of multiplying charges upon the trust, estate or trusts in the nature of charges. Of course, such may be the intention or effect of a particular will. But in the absence of anything in the will to show such an intention, the rule is that the Court will not impute it to the testator. In the case of *Hindle* v. *Taylor*,[1] Lord Cranworth held that in almost all cases, it is not a reasonable way of reading a trust created by reference to other trusts to consider everything as there repeated, and so to make a duplication, as it were, of trusts in the nature of charges. This opi[illegible] has been recognized as sound in subsequent cases. That in this case the widow's interest after remarriage is in the nature of a charge hardly admits of dispute.

UNDUE INFLUENCE.

BAUDAIN ET AL. v. RICHARDSON.[2]

40. In order to set aside a will on the ground of "undue influence" the exercise of coercion in the particular case must be proved, by means of which the mind of the testator has been coerced into doing that which he did not desire to do.

41. If the act is shown to be the result of the wish and will of the testator at the time, then, however immoral may be the consideration which brought it about—apart from fraud—it is not undue influence.

LORD MACNAGHTEN, page 294:—As regards undue influence, all that can be said is that undue influence is conspicuous by absence. Influence may be degrading and pernicious and yet not undue influence in the eye of the law. The leading authority on the subject is the judgment of Cranworth, L.C., in *Boyse* v. *Rossborough*.[3] It was the experience of Sir James Hannen that "there is no subject upon which there is a greater misapprehension." The misapprehension "arises," he says, "from the particular form of the expression." In his charge to a special jury in the case of *Wingrove* v. *Wingrove*,[4] where those remarks occur, the learned president explains, very much as Lord Cranworth had explained, what is

1 5 De Gex, M. & G., 577; 25 Law J., Rep. Chanc., 78.
2 Jersey, rev., 27th February, 1906, 94 L. T. R., 290, 22 T. L. R., 333; 75 L. J., n.s., 57.
3 6 H. L. C., 2.
4 2 P. Div., 81.

and what is not undue influence. He speaks of "influence" in its popular signification. He gives the instance of a young man caught in the toils of a designing woman or led astray by a profligate companion, with the result that under the influence by which he is surrounded he persuades himself to leave his property to the mistress of the man who has been his evil genius. However shocking the case may be, however cruel to his nearest relatives, that is not undue influence. "To be undue influence in the eye of the law," says the learned president, "there must be—to sum it up in a word—coercion. It must not be a case in which a person has been induced by means, such as I have suggested to you, to come to a conclusion that he or she will make a will in a particular person's favour, because, if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence." Then his Lordship points out that there are different kinds of coercion, and concludes by saying that if the act is shown to be the result of the wish and will of the testator at the time, then, however it is brought about—putting aside a case of fraud—still is not undue influence." "There remains," his Lordship adds, "another general observation that I must make, and it is this: that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced."

See GIFTS.

APPENDIX "A[1]"

BRITISH COLONIES AND NATURE OF THEIR CIVIL LAW.

GENERAL REMARKS.

a. The authority of the British Crown over the numerous colonies which form part of the empire is derived from various sources. Some of them are countries conquered over the native inhabitants or over independent States; others were uninhabited countries discovered and peopled by English subjects—these are generally called "settlements"; others again are lands peopled by infidels and acquired either by treaty or by progressive settlement which introduced into them, first, European civilization, and afterwards, as a consequence, English authority.

In conquered countries, as a general rule, the existing laws of the inhabitants remain in force. In settlements, the English law is alone applicable. In colonies created by settlement, conquered, or obtained by treaty with the infidels, the law of England is applied to British subjects, and the native law to the infidels. However, where no native law is found for special cases, recourse is had to English law. Of course, these principles may be, but seldom are, modified by treaty or by the authority of Parliaments.

In all the colonies, the criminal law is that of England. But, to a greater or less extent, both the civil and criminal law have been, in every colony, altered by Parliaments, Charters of justice, Crown's and Governors' ordinances.

b. Maltese Law.—The laws of the Island of Malta were codified, in 1784, by the Great Master of the Order of Malta, Emmanuel de Rohan. They consist of the Sardinian law, amended by the local ordinances. In cases not provided for, the dispositions of the Sardinian civil code or of the Roman law as found in the *Corpus Juris civilis* are applied.

c. French Law.—France, before the *Code Napoléon*, which came in force in 1803, was divided in *pays de droit écrit* and *pays de droit coutumier*. The first comprised all the provinces which admitted the Roman law; the others were governed by their own Customs.

1.—Several changes having taken place in the British Colonial Empire since 1891, it has been thought advisable to re-print in this second volume this Appendix "A" with the necessary corrections.

There were three hundred and sixty Customs; sixty of which were general, and three hundred, local; the principal ones were those of *Paris, Orléans* and *Normandie*. Most of them were reduced to writing. Notwithstanding this distinction, the Roman law was everywhere, throughout France, considered as the common law. The only difference was that in the *pays de droit coutumier*, the Roman law was applied only in the absence of any provisions in the Custom (*Loyseau, liv. 2, ch. 6, 5*). The *Code Napoléon* has abolished all previous laws.

d. Roman-Dutch Law.—The Roman-Dutch law is the old Roman law as altered by the ordinances of the kingdom of Holland. Hollanders or Dutchmen were in the last centuries great navigators. They discovered and established numerous colonies in Asia and Australia, a great number of which are now under the authority of the English Crown. In these countries, they introduced their laws, and the inhabitants have preserved them until our time. A Dutch code was made in 1838.

e. Spanish Law.—The kingdom of Spain established its laws in the colonies created by it in America. They were the old Spanish law having its sources in ancient usages, Canonical law, Roman law, Decisions, Degrees and Government ordinances. Spanish laws have been since codified.

COUNTRIES.	COLONIES.	LAW.	REMARKS.
EUROPE.			
	Malta	Sardinian	Ceded by France; treaty of 1874. *See b.*
	Gibraltar	English	Conquered over the Spanish in 1704. Ceded by the Treaty of Utrecht in 1713. English law was introduced by charters of justice; 7th Geo. I; 13th and 26th Geo. II; 57th Geo. III.
	Heligoland	Danish	Ceded by Denmark in 1814: treaty of Kiel. The Danish law is very nearly similar to the Roman-Dutch law. This island is governed by a civil code in 14 articles. Ceded to Germany in 1890. *See d.*
Channel Islands.	Jersey	French (*Custom of Normandy*)	Ceded by France in 1360: treaty of Bretigny. *See c.*
	Guernsey	do do	Brought to the English Crown with the duchy of Normandy by Henri I, in 1100. *See c.*
	Isle of Man	English	Bought from Earl Derby and Duke of Athol, in 1765. *See a.*

COUNTRIES.	COLONIES.	LAW.	REMARKS.
Asia.			
British India . . .	Bengal	Roman-Dutch and Native . . .	Conquered over the Mogols in 1765. Capital: Calcutta 1. *See a*
	North West Provinces (*Oudh, Allahbad and Agra*)	English and Native	Conquered in 1803. *See a.*
	Punjaub	do do . .	Conquered in 1849 *see a.* Capital: Lahore 1.
	Central Provinces	do do . .	Constituted in 1861 with different territories conquered over the natives. *See a.*
	British Burmah (*Rangoon*)	do do . .	Ceded by the Burmeses in 1826. *See a.*
	Assam	do do . .	Ceded by the Burmeses in 1826; incorporated in 1838. *See a.*
	Madras (*Madura*)	Roman-Dutch and Native . . .	Ceded by the Radjah of Bidjanagor in 1639. *See a. d.*
	Bombay	do do . .	Brought to the English crown by Catherine, a Portuguese princess, wife of Charles II, in 1661. *See a.*
	Muscat	do do . .	Consular Court. Order in Council 1867.
British Possessions in the East	Aden	Roman-Dutch . . .	Conquered in 1839, over the Dutch. *See a. 4.*
	Ceylon	do do . .	Conquered over the Dutch in 1796 Ceded by the treaty of Amiens in 1802. *See a. 9.*
	STRAITS SETTLEMENTS COMPRISING	. . . . .	Separated from India in 1863. Except in Wellesley and Malacca, the English Common and Statute law, previous to 1826, was introduced in the Straits Settlements. It was modified by the Indian Act in 1867, and since by local ordinances.
	Singapore . . .	English and Native	Settlement of 1819. *See a.*
	Penang or Prince of Wales Island	do do . .	Ceded by the Maltese in 1766. *See a.*
	Wellesley	Roman-Dutch and Native . . .	Conquered over the Dutch in 1797. *See a. d.*

COUNTRIES.	COLONIES.	LAW.	REMARKS.
ASIA.	STRAITS SETTLEMENTS COMPRISING		
British Possessions in the East	Dinding	English and Native	Conquered in 1827. *See a.*
	Malacca	Roman-Dutch and Native	Conquered over the Dutch in 1825. *See a, d.*
	Cocos or Keelings Islands	English	Settlement of 1823. *See a.*
	Hong Kong	English and Native	Ceded by China in 1842: treaty of Nankin. *See a.*
	Cyprus	do do	By a convention between England and Turkey, in 1878, this colony was put under British government for as long as Batoum and Kars may be kept by Russia.
	British North Borneo[1]	do do	Conquered over the Maltese and Javanese pirates in 1846. Ceded by the Sultan of Brunei in 1877. *See a.*
	Labuan[1]	do do	Ceded by the Sultan of Borneo in 1846. *See a.*
	Saramak[1]	do do	Ceded by the Sultan of [illegible] in 1861.
Federated Malay States	Perak, Selangor Negri Sembilan, Tahany	English and Native	Organised under a treaty. *See a, d.*
China and Corea	Shanghai	do do	Consular Court. Order in Council, 1904.
	Wei-hai-Wei	do do	do do do 1898.
Japan	do	do do	do do do 1899.
Turkey	Constantinople	do do	Consular Court.

1 Since the 1st January, 1890, the administration of British Borneo, Labuan and Saramak has been transferred to the British North Borneo Company.

COUNTRIES.	COLONIES.	LAW.	REMARKS.
AMERICA.			
Canada	Quebec (*Lower Canada before the confederation of* 1867)	French (*Custom of Paris*)	Conquered in 1759, ceded by France in 1763; treaty of Paris. A Civil code came in force the 1st August 1866. The previous laws are not abolished. The Code is very nearly similar in principle to the Code Napoléon. *See e.*
	Ontario (*Upper Canada before the confederation of* 1867)	English	Peopled by English. Ceded with Quebec. *See a.*
	New Brunswick	do	Part of Acadia. Conquered over the French in 1666. Ceded in 1713. The Acadians were dispersed and replaced by English settlers. *See a.*
	Nova Scotia	do	Part of Acadia. Conquered over the French in 1666. Ceded in 1713. Capital Halifax. *See New Brunswick.*
	Prince Edward Island	do	Ceded by the French in 1763, with Quebec and Ontario. Cape Breton forms part of it. *See a.*
	British Columbia	do	Settlement of 1856. *See a.*
	Saskatchewan	do	Detached from the North-West Territories in 1905. *See a.*
	Manitoba	do	Detached from the North-West Territories in 1870. *See a.*
	Alberta	do	Detached from the North West Territories in 1905. *See a.*
	North West Territories	do	Settlement ceded by England to the Hudson Bay Co. in 1766, and bought by Canada in 1871. *See a.*
	Newfoundland	do	Ceded by France in 1713; treaty Utrecht English law introduced by 5 Geo. IV., ch. 67. *See a.*
	Yukon Territories	do	Detached from the North-west Territories, 26th Aug. 1897. *See a.*

COUNTRIES.	COLONIES.	LAW.	REMARKS.
AMERICA.			
British Guiana	Demerara	Roman-Dutch	Conquered over the Dutch in 1803. Ceded by treaty in 1814. *See a, d.*
	Essequibo	do	do do
	Berbice	do	do do
	Bermuda	English	Settlement of 1609. *See a.*
British Possessions in West India	British Honduras	do	Conquered over the Spanish in 1996. English law introduced by Proclamation. *See a.*
	Bahamas or Key's Islands (*Lucayes*)	do	Settlement of 1629. Conquered by Spanish in 1781. Bought from them in 1783. *See a.*
	Jamaica	do	Conquered over the Spanish in 1655. English law introduced by 1 Geo. II, ch. 1, § 17, s. 22. *See a.*
	Turks and Cairos Islands	do	do do *See a.*
Leeward Islands	Antigua	do	Settlement of 1632. *See a.*
	Barbuda	do	Settlement of 1639. *See a.*
	Montserrat	do	Settlement of 1528. *See a.*
	St. Christopher	do	Owned in common by England and France since 1627. Ceded by France in 1713: treaty of Utrecht.
	Nevis	do	Settlement of 1823. *See a.*
	Anguilla	do	Settlement of 1666. *See a.*
	Dominica	do	Ceded by France in 1763. *See a.*
	The Virgin Islands	do	Settlement of 1665. *See a*

COUNTRIES.	COLONIES.	LAW.	REMARKS.
AMERICA.			
Windward Islands	Grenada	English	Captured by French in 1779. Restored to England in 1783. Grenada Act No. 26, in 1874, declared the English law previous to 1729 to be the common law.
	St. Lucia	French (*Custom of Paris*)	Conquered over the French in 1803. Ceded by treaty of 1814. *See c.*
	St. Vincent	English	Ceded by France in 1763. Proclamation of 7th October, 1763, introduced the English law.
	Barbadoes	do	Settlement of 1605. *See a.*
	Tobago	do	Ceded to France, in 1802, by the treaty of Amiens, retaining the law of England previous to 1802. Restored to England in 1803.
	Trinidad	Spanish	Conquered, in 1797, over the Spanish, who retained their law. *See a, c.*
North-West Frontier Province	Peshamans	English and Native	Constituted in 1901. *See a.*
	Konat	do do	do do
	Kasara	do do	do do
	Banner	do do	do do
	Dera Ismail Khan	do do	do do
AFRICA.			
South Africa	Cape of Good Hope	Roman-Dutch	Conquered, in 1795, over the Dutch. Ceded by treaty of 1815. The law of Holland remained in force. *See a, d.*
	Griqualand West	do do	Annexed to the British Empire in 1871. *See a.*
	Basutoland	Roman-Dutch and Native	Annexed to the Cape colony, in 1871, after a war with the natives. Became a separate colony in 1880.

COUNTRIES.	COLONIES.	LAW.	REMARKS.
AFRICA.			
South Africa ..	Bechuanaland ..	Roman-Dutch and Native ...	Conquered over the natives in 1884. Became a separate colony in 1885. It was annexed to Cape Colony in 1895.
	Natal.....	do do ..	Conquered over the Dutch in 1844. *See a, d.*
	Zululand	English and Native	Part of this kingdom is under British Protectorate since the war of 1879.
	Orange River ...	Roman-Dutch...	Conquered over the Boers and annexed to the Empire on May 31st, 1902. *See a, d.*
	Transvaal	do do	do do
West Africa	Gambia	English	Settlement of 1631. *See a.*
	Gold Coast	English and Native.....	Settlement of 1672. *See a.*
	Northern Nigeria	do	Organised after many amendments by Order in Council in 1906. *See a.*
	Southern Nigeria	do	do do
	Sierra Leone....	do do ..	Settlement of 1787. Ruled under a Charter of Justice of 1825. *See a.*
	Lagos.....	do do	Ceded by the negroes in 1861. Annexed to the Gold Coast in 1876. *See a.*
	Mauritius	French (*Code Napoleon*).....	Conquered over the French in 1810. Ceded by the treaty of 1814. *See a, e.*
	Seychelles Islands	do	Conquered from the French in 1814. Erected in colony 31st August, 1903. *See a.*
	Ashantis	English and Native	Organised by order in Council of 26th Sept., 1901.
British Central Africa.....	Nyasaland.....	do	Organised as a Protectorate in 1902. *See a.*
	Zanzibar	do	Organised under an Order in Council, 1906.

COUNTRIES.	COLONIES.	LAW.	REMARKS.
AFRICA.			
North - Western Rhodesia	Bashukolumbene	English and Native	Organised under a charter in 1902. *See c.*
North - Eastern Rhodesia	Detached from different Colonies	do	Order in Council in 1900. *See c.*
British Possessions in Southern Atlantic	Ascension	English	Annexed to the British Empire in 1815. Occupied as naval post. *See a.*
	Tristan d'Acunha (Island of)	do	Settlement of 1816. *See a.*
	Falkland Islands	do	Settlement of 1833. *See a.*
	St. Helena	Roman-Dutch	Conquered over the Dutch in 1651. *See a, d.*
East Africa Protectorate	Formed of parts detached from different Colonies	English and Native	Organised by Order in Council in 1906. *See a.*
	Uganda	do	Exterritorial jurisdiction under Order in Council of 1906. *See a.*
	Alexandria	do	Consular Court statute of 1899. *See a.*
	Cairo	do	[illegible]
	Mansourah	do	[illegible]
	Soudan	do	Consular Court, 1899. *See a*
	Morocco	do	Order in Council 1889. *See a*

COUNTRIES.	COLONIES.	LAW.	REMARKS.
AUSTRALIA.			
	New South Wales	English	Settlement of 1787. *See a.*
	Victoria.....	do	Separated from New South Wales in 1851. *See a.*
	Queensland.....	do	Separated from New South Wales in 1859. *See a.*
	British New Guiana.....	English and Roman-Dutch...	Annexed to the British Empire in 1884. *See a.*
	Western Pacific.	English and Native	Group of Islands in the Pacific Ocean, under the jurisdiction of a High Commissioner since 1872. *See a.*
	Commonwealth of Australia...	do	Organized by Proclamation of 17th September, 1900. *See* [illegible]
	South Australia.	do	Settlement of 1836. *See a.*
	Western Australia.....	do	Settlement of 1829. *See a.*
	New Zealand ...	do	Purchased from the natives in 1845. *See a.*
	Fiji Islands.....	do	Ceded by the natives in 1874. *See a.*
	Van Diemen's Land or Tasmania Island..	do	Settlement of 1804. *See a.*

APPENDIX "B."

Articles of the Code of Civil Procedure relating to appeals to Privy Council.

Article 68.—An appeal lies to Her Majesty in Her Privy Council from final judgments rendered in appeal by the Court of Queen's Bench:

1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue, or any sum of money payable to Her Majesty;

2. In cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected;

3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling.—*C. C. P.*, 1178, *amended; C. C.* 17.

Article 69.—Causes adjudicated upon in review, which are susceptible of appeal to Her Majesty in Her Privy Council, but the appeal whereof to the Court of King's Bench is taken away by Articles 43 and 44, may nevertheless be appealed to Her Majesty.

C. C. P., 117*a*, *in part; R. S.*, 6009, *in part.*

DECISIONS RENDERED BY THE COURT OF QUEEN'S BENCH, THE COURT OF KING'S BENCH (APPEAL SIDE), AND THE COURT OF REVIEW, UNDER THE CODE OF CIVIL PROCEDURE OF THE PROVINCE OF QUEBEC, ON APPEALS TO THE PRIVY COUNCIL.

THERE IS NO APPEAL TO THE PRIVY COUNCIL:

The Court of Review has no jurisdiction to grant leave to appeal from a judgment of that Court to the Queen in Her Privy Council, unless the interest of the party prejudiced by it,

and who seeks to relieve himself from the judgment by appeal, exceeds £500 sterling.

JOHNSON, C. J., page 200:—"In this case, in which we last week confirmed the judgment of the Superior Court at St. John's, condemning the defendant to pay $500 damages and costs, a motion was made by the defendant for leave to appeal to Her Majesty in Her Privy Council, under the amendment by the 37 Vict., ch. 7, to Art. 494, C. P. By those provisions an appeal was given to Her Majesty in Her Privy Council direct from this Court, in cases where the appeal to the Queen's Bench from this Court was taken away, and where it would lie from the Queen's Bench if the judgment had been given by that Court. The defendant seemed to rely upon the amendment of 1891 to the Supreme Court Act, which had nothing to do with the present case. The Privy Council in the case of *Allan* v. *Pratt* (11 *Leg. News*, p. 273), laid down the rule clearly that the proper measure of value for determining the right of appeal is the amount recovered by the plaintiff in the action, and against which the appeal could be brought; and that case adopted the rule in *McFarlane* v. *Leclaire* (6 L. C. J., 170), that had been laid down still more clearly by Lord Chelmsford, that the judgment is to be looked at as it affects the interests of the party prejudiced by it and who seeks to relieve himself from it by appeal. Such cases are limited to the minimum amount of £500 sterling by Art. 1178, C. P.

"The defendant's motion is therefore rejected."

C. R., Sir Johnson, C. J., Jetté, Pagnuelo, JJ., 1893, *Marchand* v. *Molleur*, R. J. Q., 4 C. S., 200.

Where leave to appeal to the Privy Council has been granted by the Court of King's Bench sitting in appeal, from a judgment rendered by the latter tribunal, and a delay having been fixed for putting in security, the delay has expired without security being furnished, and without any application having been made for an extension of the delay before the expiration thereof, and the record has thereupon been transmitted to the Court below, the Court of King's Bench, or a judge thereof, has ceased to have jurisdiction over the cause, and cannot grant an application, made subsequently, for the extension of the delay for putting in security

HALL, J., page 62:—"Leave to appeal to the Privy Council was granted in this case on 21st January last, the security to be furnished within the usual delay of six weeks which expired on 4th March instant. The security was not furnished within that delay, and on 5th March the record was remitted to the Superior Court.

On that day, appellants gave notice that on 7th March they would present a petition to a judge of this court in chambers for an extension of thirty days for putting in such security.

"The petition is opposed by respondents upon the ground that this court has no longer jurisdiction to interfere in the procedure to be taken in this case.

"I am of opinion that this objection is fatal. This court has no power to determine definitely whether or not a right of appeal exists in a particular case to the Privy Council. That right is determined by Art. 68 of our Code of Procedure, as it may be interpreted by the Privy Council itself. A practice has obtained of making an application to this Court by the party desirous of appeal, for *permission* to appeal to the Privy Council, and a corresponding practice, which in my opinion has no *raison d'être*, to make an order, granting such application with a delay of six weeks for putting in security. We have undoubtedly the right, if there a *prima facie* right to such an appeal, to adjudicate upon the application in so far as procedure is concerned, and to order the retention of the record for a reasonable period to enable the security to be put in. Until the expiry of that delay the case remains in *statu quo*, the record is in the possession of the officers of this court, and the court itself, or a judge of the court in chambers, can exercise the usual powers of the court in so far as questions of procedure are concerned, and could probably extend, for good cause, the delay which the Court originally fixed for putting in security; but when that delay has expired without any application having been made for its extension and without any security having been put in, and in consequence the record has been regularly returned to the Superior Court, I consider that the functions of this court or of any of its judges are at an end.

"The distinction above made, between an application pending the delay and one after its expiry, was recognized by this Court in the case of the *Mayor of Montreal & Hubert*.[1]

"There are a number of other reported decisions touching more or less intimately the question under discussion which counsel may be interested to examine.

Jones & Lemoine,[2] *Mullin & Archambault*,[3] *Lemoine & Lionais*,[4] *Brewster & Chapman*,[5] *Caverhill & Robillard*.[6]

"The petition is dismissed with costs."

C. K. B., 1901, *The Asbestos and Asbestic Company* v. *The William Slater Company*, R. J. Q., 10 K. B., 61; 3 R. P., 491.

1 21 L. C. J., 85.
2 2 L. C. L. J., 161.
3 2 L. C. J., 117.
4 16 L. C. J., 99.
5 20 L. C. J., 295.
6 21 L. C. J., 74.

The actions of the company respondent was for $15,000, but the respondent subsequently consented that judgment should go for $25. In the course of the suit the respondent obtained a writ of injunction against the appellant, to restrain any infringement of the respondent's rights under a patent. This injunction was maintained by the final judgment of the Superior Court, but the judgment was reversed in appeal. The respondent now moved for leave to appeal to His Majesty in his Privy Council.

Held:—That the "matter in dispute" being the damages such the appellant would suffer if the respondent acted contrary to the order of the Court, and those damages being contingent and not susceptible of determination, it was impossible to say that the matter in dispute exceeded the sum or value of £500 sterling, and the case did not fall within the terms of Article 68, paragraph 3, of the Code of Procedure.

Sir Alexandre Lacoste, C. J., page 114:—"L'intimée nous a présenté une motion pour appel au conseil privé.

"L'appelant s'objecte, et prétend que l'intimée n'est dans aucun des cas prévus par l'article 68 du code de procédure, qui détermine dans quels cas il y aura appel au conseil privé.

"Cette cause ne tombe pas sous le paragraphe premier de l'article, lequel se rapporte aux honoraires d'office et aux droits payables à Sa Majesté.

"Elle ne tombe pas non plus dans la classe des actions mentionnées au paragraphe 2, car il ne s'agit pas de droits immobiliers, rentes annuelles ou autres matières du même genre qui peuvent affecter les droits futurs des parties. Elle ne pourrait venir que parmi les actions dont il est question dans le troisième paragraphe de l'article, c'est-à-dire, que ce serait une cause où la matière en litige excède la somme ou valeur de £500 sterling.

"D'après la jurisprudence du conseil privé, afin de déterminer la matière en litige il faut considérer l'intérêt de la partie au moment où elle demande la permission d'appeler.

"Quelle est actuellement la matière en litige dans la présente cause?

"L'action était originairement pour $15,000.00, mais, dans le cours du procès, l'intimée, pour éviter les frais, a consenti que le jugement n'intervint que pour $25. La cour supérieure n'a accordé jugement que pour cette somme. Nous avons cassé ce jugement, et tout ce que l'intimée pourrait obtenir du conseil privé, serait la confirmation du jugement de la cour supérieure, c'est-à-dire la condamnation à une somme de $25. La matière en litige

dans l'action proprement dite n'est donc pas d'une somme assez élevée pour donner droit à un appel au conseil privé.

"Mais il y a une autre matière en litige dans cette cause. Dans le cours de l'instance l'intimée a obtenu un bref d'injonction contre l'appelant. Ce bref a été déclaré péremptoire par le jugement final de la cour supérieure, et il se trouve avoir été cassé par le jugement de cette cour.

"Y a-t-il en cela une matière en litige excédant la valeur de £500? Le jugement défend à l'appelant d'importer les "Gold Hose Couplings" et les "Gold Straight Port Steam Couplings," en un mot, de ne rien faire en violation des droits brevetés de l'intimée.

"Il nous est impossible de déterminer d'après le dossier la valeur en argent de cet ordre. Il vaut le montant des dommages que l'appelant ferait subir à l'intimée en agissant contrairement à l'ordre de la cour. Ces dommages sont éventuels. La valeur et l'importance du brevet ne donne pas le montant de ces dommages. Les dommages subis par l'appelant et par d'autres, même par l'appelant seul, ne nous permettent pas d'évaluer les dommages futurs. Nous ne pouvons pas dire avec certitude que la valeur de l'injonction excède £500 sterling, par conséquent que l'appel existe de droit. Le Conseil privé pourra exercer sa discrétion et accorder un appel de grâce; mais nous sommes liés par le texte de la loi, et il n'est pas établi à notre satisfaction que l'intimée soit dans un des cas prévus par l'article 68 C. P. C.

On a cité les causes de *Dobie & Board of the Presbyterian Church et de Joly & MacDonald*,[1] où cette cour a permis un appel dans ces deux causes, l'injonction se rapportait à des choses certaines et déterminées. Dans la première il s'agissait de la jouissance ou administration d'un fonds de £1642, je crois, et dans la seconde, de la possession d'un chemin de fer valant des millions. Dans un cas, il s'agissait de propriété immobilière, et dans les deux cas d'une matière en litige dont le montant et la valeur étaient clairement déterminés.

"La motion pour appel est rejetée avec dépens."

C. K. B., 1901, *Came* v. *The Consolidated Car Heating Company*, 1 Q. J. R., 11 K. B., 114.

A judge of the Court of King's Bench in Chambers has no jurisdiction to entertain an application for leave to appeal to the Privy Council from a judgment rendered by the court.

HALL, J., page 338:—"In this case, a motion is submitted to me, in Chambers, to allow the appellant to appeal to His Majesty's Privy Council from a judgment rendered by this Court on the 20th September instant, and to grant him the usual delay of six weeks within which to put in security.

1 S. L. R., 308

"In the case of *Brewster & Lambe* (1879), partially reported at pages 75 and 109, 3 L. N., and editorially referred to at page 105 of the same volume, the original record of which I have examined, in which the statutory right of appeal to the Privy Council clearly existed, counsel for the losing party having been prevented by accident from being present in court when the judgment of the Court of Queen's Bench was rendered, and being desirous of appealing to the Privy Council, presented a petition to Chief Justice Sir A. A. Dorion in Chambers, within 15 days from the date of the judgment, offering to furnish the necessary sureties at once and praying that this petition should stand as a rule for the first day of the succeeding term, and that all proceedings in the cause be stayed until the hearing and determination upon the said rule.

"Upon a hearing of both parties in Chambers, the appellant was allowed to withdraw the above notice and to fyle a notice to the Clerk of Appeals to prepare a security bond for a subsequent day with notice thereof to the respondent. On that day, the petition was allowed to the extent of receiving the security bond and rejected as to a further reference to the full court. The sureties having executed the bond, an entry in the register was made upon the order of the Chief Justice that the said bond is 'taken, acknowledged and fyled.' This was held by the parties and by the officials of the Court as the equivalent of the ordinary judgment upon motion, in term, that leave to appeal to the Privy Council be allowed. This novel procedure appears to have received the sanction of the full Court, as a motion was made by the respondent on the first day of the subsequent term to transmit the record to the Court below, in order that proceedings for its execution might there be taken. The grounds of the motion were: 1. That no appeal to the Privy Council had been allowed according to the practice of the Court, and 2. That the security given before the Chief Justice had not been authorized by the Court. This motion came on for a hearing before Chief Justice Dorion and Justices Monk, Ramsay, Tessier and Cross, and was rejected, but without costs.

"In the present application I have very great doubt if the judgment is susceptible of appeal to the Privy Council under the provisions of our code. Had it been a case in which such right clearly existed and the appellant relying upon his statutory right to such appeal had offered the requisite security, I would have been inclined with the personal views as to such right expressed in *Asbestos Co. & Sclater*,[1] to have received the bond and thus retained for this Court the temporary control of the record.

"In the present case, however, no security is now offered and I am asked to grant in Chambers the motion for leave to appeal, which is invariably submitted to the full court. I can find no

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1 10 K. B., 61.

authority for the exercise of such power and I am obliged therefore to dismiss the motion."

C. K. B., 1905, *Palliser vs. The Consumers Cordage Company*, 1 Q. J. R., 14 K. B., 338.

THERE IS AN APPEAL TO THE PRIVY COUNCIL:

According to the jurisprudence of the Privy Council, *Macfarlane & Leclair, and Allan & Pratt*,[1] the words "matter in dispute," "matière en litige," in article 1178 of the Civil Code of Procedure, mean the amount granted by the judgment appealed from, and not the amount demanded by the action.

SIR ALEXANDRE LACOSTE, C.J., page 292:—"Dans chacune des deux causes qui nous sont soumises, le montant de la demande s'élève à plus de £500 sterling, mais le montant du jugement, en autant que la preuve en est faite, ne s'élève pas à £500 sterling.

"Nous avons à décider si par les mots, "matière en litige" qui se trouvent dans l'art. 1178, C. P. C., on doit entendre le montant de la demande ou celui du jugement.

"La jurisprudence de cette cour a été d'abord quelque peu hésitante.

"En 1862, dans la cause de *Macfarlane & Leclaire*,[2] le conseil privé a décidé que la cour devait être guidée par le montant du jugement. Nonobstant cette décision, cette cour, dans la cause de *Stanton & Home Insurance Co.*,[3] a décidé, en 1879, que c'était le montant de l'action qui donnait le droit d'appel. L'honorable juge en chef d'alors n'a pas accepté l'interprétation du conseil privé. D'après lui, la loi serait très explicite, et il a présumé qu'on n'avait pas cité le statut aux lords du conseil privé.

"La question s'est de nouveau présentée en 1888, dans *Allan & Pratt*,[4] et le conseil privé a déclaré qu'il se trouvait lié par le jugement qu'il avait rendu dans *Macfarlane & Leclaire*.

"Dans ces circonstances nous n'avons aucune hésitation à adopter la décision du conseil privé.

"Je dois cependant déclarer que, dans l'opinion des membres de cette cour, d'après l'interprétation qu'ils donnent à la loi, c'est le montant de la demande qui devrait décider de l'appel. Les statuts refondus du Bas-Canada (C. 77. sec. 251) le disent en toutes lettres. Il est vrai que les codificateurs ont laissé choir cette section,

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1 32 L. C. J., 278.
2 6 L. C. J., 170.
3 3 L. N., 314.
4 32 L. C. J., 278.

mais tout de même elle a toujours été considérée comme étant en vigueur et elle est reproduite dans l'article 2311 des statuts revisés de la Province de Québec. La cour suprême a dernièrement décidé, dans la cause de *Dufresne & Guèvremont*,[1] que c'était le montant de la demande qui servait de règle à l'appel. Mais cette cour définissait alors sa propre juridiction et elle pouvait ne pas se croire liée par les décisions du conseil privé. Nous ne saurions en faire autant dans la position où nous sommes.

"Les deux motions sont rejetées avec dépens."

C. B. R., 1897, *The Glengoil Steamship Co.* v. *Pilkington*, R. J. Q., 6 B. R., 292.

Appeal to the Privy Council will be allowed in an action for $110.00, if there is future rights affected, as in a judgment declaring the Grand Trunk Company bound to construct a farm crossing for each farm crossed by its railway line, whether these farms be subdivisions or not of land originally expropriated.

C. B. R., 1892, *Grand Trunk Railway Co.* v. *Huard*, R. J. Q., 1 Q. B., 501.

The Court of Appeal is bound by the Code of Civil Procedure which allows an appeal only in special cases, and it cannot, as the Judicial Committee, grant at its discretion, special leave to appeal.

C. K. B., 1898, *The Pulp Company of Megantic* and *The Corporation of the Village d'Agnès*, 1 R. J. Q., 7 Q. R., 349.

In cases of Petition of Right, there is an appeal to His Majesty in Council of the final judgment of the Court of Queen's Bench. The new Code of Civil Procedure has changed the law in that respect.

SIR ALEXANDRE LACOSTE, C. J., page 420:—"Il y a peut-être du vrai dans l'argument du pétitionnaire Demers quand il dit que l'intention originaire du législateur était de rendre définitif le jugement de cette cour en matière de pétition de droit. Mais les codificateurs ont incorporé "l'Acte des pétitions de droit de Québec," 46 Vic., c. 27, dans le nouveau code, cet acte n'est plus une législation distincte et séparée, mais une partie intégrante du Code de Procédure, soumis aux règles générales qui s'y trouvent et devant s'interpréter de manière à donner effet à toutes les dispositions qui peuvent s'y rattacher ou l'affecter. L'article 1 C. P. dit que "Les lois sur la procédure et les règles de pratique existant lors de la mise en vigueur du présent code sont abrogées: 1. Dans tous les cas où le code contient quelque disposition qui a expressément ou implicitement cet effet." L'article 68 donne ouverture à l'appel à

[1] 26 Rep. C. Sup., 316.

Sa Majesté de tout jugement final de cette cour dans les causes où la matière en litige excède la somme de £500 sterling; il n'y a pas d'exception. Il est vrai que les articles qui régissent la matière des pétitions de droit ne donnent pas l'appel à Sa Majesté, mais ils sont soumis à la règle générale contenue dans l'article 68. D'ailleurs, le statut originaire est changé, par exemple, en autant que la Cour de Révision est concernée; ce statut ne donnait pas juridiction à la Cour de Révision en matière de pétition de droit; l'article 1020 lui attribue cette juridiction, et l'on voit que l'intention du législateur a été de soumettre les pétitions de droit aux règles ordinaires de la procédure en matière d'appel. La motion devra par conséquent être accordée.

C. B. R., 1898, *La Reine* v. *Demers*, 1 R. P., 418.

The appellant allowed the delay of 60 days, from date of judgment rendered by the Court of King's Bench, to elapse without applying for leave to appeal to the Supreme Court. Subsequently, it obtained leave to appeal to the Privy Council. It now moved for leave to appeal to the Supreme Court, and offered to desist from its appeal to the Privy Council, if the present motion was granted.

Held, that the "special circumstances" referred to in section 42 of the Supreme and Exchequer Courts Act, are circumstances which would make it unreasonable to impute the failure to act within the prescribed time to the negligence of the party seeking the appeal, *e.g.* illness, absence, ignorance of the rendering of the judgment, inability owing to poverty to find sureties within the prescribed delay, but not circumstances which did not prevent the application from being made within the proper delay.

WURTELE, J., page 325:—"The appellant appealed to the Court of King's Bench from a judgment rendered by the Superior Court in favor of the respondent, and, on the 27th December, 1901, the judgment was confirmed and the appeal was dismissed.

"The appellant allowed the delay of 60 days from the pronouncing of the judgment within which an appeal can be brought to the Supreme Court under section 40 of the Supreme and Exchequer Courts Act to elapse without taking any proceedings to appeal to the Supreme Court.

"The appellant subsequently moved the Court of Appeal for leave to appeal to the Privy Council, and such leave was granted on the 18th March, 1902, subject to the usual condition of giving security within a delay of six weeks.

"The appellant now makes an application to be allowed to appeal, notwithstanding that the time for bringing an appeal has lapsed, alleging that there are special circumstances which would justify

the allowance of the appeal under the provisions of section 42, and declaring that it is ready to desist from the appeal which was allowed to it to the Privy Council, provided the application for an appeal to the Supreme Court be granted.

"Section 42 provides that an appeal to the Supreme Court may be allowed under special circumstances, notwithstanding the expiration of the delay of 60 days prescribed by section 40. The question to be considered is, therefore, what is meant and intended by the condition of special circumstances. The general rule is that appeals have to be brought within 60 days, and the exception to this rule is limited to cases in which the omission to take proceedings within the prescribed time is caused by special circumstances. I hold that the omission to bring the appeal within the prescribed time must have been caused by special circumstances which would make it unreasonable to impute the failure to act within the prescribed time to negligence on the part of the party seeking the appeal. *Platt* v. *G. T. Ry.*, p. 383. For instance, the party seeking relief may have been ill for several weeks after the pronouncing of the judgment and have been unable to attend to business; or he may have been absent at the time of the rendering of the judgment and have only returned after the expiration of the delay, without having received any notice of the rendering of the judgment; or he may have given notice of appeal, but may have been unable, owing to poverty, to find the necessary security and may only have been able to find persons willing to become his sureties after the expiration of the 60 days prescribed by section 40.

"Now, are the special reasons set up in the petition those which are contemplated by section 42?

"The first is that the judgment was rendered during the holidays; but the vacations established by art. 15 of the C. C. P. do not apply to the Court of King's Bench, and the delay of 60 days ran during the vacation from the 20th day of December to the 10th day of January, and during which the judgment sought to be appealed from was rendered, and it was the appellant's business to attend to the matter.

"The next circumstance is that the civic elections took place on the first day of February, subsequent to the day on which the judgment was rendered, and that it was difficult for the attorneys of the city to get any instructions from the corporation of the city as to whether the case should be appealed or not; but the fact that the elections were soon to take place did not relieve the aldermen and the city officials from the obligation of performing meantime the duties assigned to them.

"Then, the last circumstance invoked is that the attorneys of the city were occupied at Ottawa during the month of February in

cases before the Supreme Court and on application pending before the Railway Committee, and also at Quebec attending to legislation affecting the interests of the city; but the city has six attorneys, and as an appeal in the present case was an important matter, and one deserving their attention as much as the other business referred to, the failure on the part of the city to adopt the necessary proceedings to bring an appeal was certainly negligence on the part of whomsoever's duty it was to attend to the matter.

"I am of opinion and I hold that no special circumstances have been shown which can entitle the appellant to get special permission to appeal under section 42.

"In the month of March, the appellant obtained leave to appeal to the Privy Council, and as it would have been as easy for it to apply for special allowance of an appeal to the Supreme Court, it certainly made an option and practically waived all proceedings in view of obtaining a special allowance of appeal to the Supreme Court. It would appear from the petition that the appellant suddenly determined that it would be more desirable to appeal to the Supreme Court instead of to the Privy Council; but such change of opinion is far from being a special circumstance under which special allowance of appeal can be obtained.

"Then, in the last place, a respondent should not be deprived of an advantage which he has acquired, unless it is clearly shown that to refuse an appeal would likely effect an injustice.

"In the present case the respondent escapes an intermediate stage, and the equities of the case, as regards the appellant, are satisfied by the leave to the Privy Council which has been granted. If the appellant's contention is right, it will obtain justice and relief, if entitled to it, before the Privy Council as it would in the Supreme Court.

"The appellant has not shown any grounds for obtaining special allowance to appeal to the Supreme Court, and I therefore reject its petition, with costs in favor of the respondent, the Montreal Street Railway Company.

"Petition rejected."

C. K. B., 1903, *Wurtele, J., in chambers, The City of Montreal v. The Montreal Street Railway*, Q. J. R., 11 K. B., 325.

Decisions rendered by the Supreme Court of Canada on Appeals to the Privy Council.

Enforcement of Judgment.—An appeal came before the Supreme Court, by consent, from the decision of the Judge in Equity of New Brunswick, without an intermediate appeal to

the Supreme Court of the province, and, after argument, was dismissed.[1] The judgment of the Supreme Court was subsequently reversed by the Privy Council and the case sent back to the Judge in Equity to make a decree. The plaintiffs being dissatisfied with the decree pronounced by the Judge in Equity applied for leave to appeal direct under R.S.C., ch. 135, s. 26 therefrom.

Held, Taschereau and Gwynne, J.J., dissenting, that under the circumstances of the case such leave should be granted.

Where a judgment of Supreme Court of Canada has been reversed by the Privy Council the proper manner of enforcing the judgment of the Privy Council is to obtain an order making it a rule of the Supreme Court of Canada.

Where such judgment of the Privy Council was made a rule of court, the court ordered the re-payment by one of the parties of costs received pursuant to the judgment so reversed.

Writ of certiorari moved for to bring up papers from the Supreme Court of British Columbia, the Chief Justice of that court having made an order staying execution on the judgment of the Supreme Court of Canada, certified to the court below in the usual way, on the ground that an appeal was being proceeded with to the Privy Council. Motion refused. *Sewell* v. *British Columbia Towing Co., Cassels Dig.* (2 ed.) 675, *Cassels S.C. Prac.* (2 ed.) 55.

Judgments of Court of Review. Certain ratepayers of the City of Montreal having objections to one of the commissioners named in proceedings taken for the expropriation of land required for the improvement of a public street, in which they were interested, presented a petition to the Superior Court demanding his recusation. The petition was dismissed; on an appeal to the Court of Review, the judgment dismissing the petition was affirmed, and further appeal was then taken to the Supreme Court of Canada. On motion to quash the appeal for want of jurisdiction, it was held, that no appeal *de plano* would lie from the judgment of the Court of Review to Her Majesty's Privy Council, and consequently there was no appeal therefrom to the Suprme Court of Canada under the provisions

1 9 Can. Sup. C. R., 617.

of the Act 54 & 55 Vict., c. 25, s. 3, amending the Supreme and Exchequer Courts Act.

Held, further, that the judgment of the Court of Review was not a final judgment within the meaning of s. 29 of the Supreme and Exchequer Courts Act.

SIR HENRY STRONG, C. J., page 448:—"We are of opinion that there would be no appeal in this case *de plano* to the Privy Council, and consequently there can be no appeal to this court under the Act of 54 and 55 Vict., ch. 25, sec. 3, and further, that the judgment in question does not come within the provisions of section 24 (j), and that it is not a final judgment within the meaning of the Supreme and Exchequer Courts Act.

"The appeal must be quashed with costs."

Canada, Supr. C., 1899, *Ethier* v. *Ewing*, 29 Sup. C. Rep., 446.

Leave to Appeal.—The Supreme Court of Canada has no jurisdiction in respect to the granting or refusal of applications for leave to appeal to the Judicial Committee of the Privy Council, and notice of such an application ought not to be put upon the motion paper. *Kelly* v. *Sullivan; Moore* v. *Connecticut Mutual Ins. Co.; Queen Ins. Co.* v. *Parsons, Cass. Dig.*, (2 ed.), 695. *Coutlee's Digest, vis. Privy Council*, No. 2, p. 1165.

Leave in forma pauperis.—A motion was made for an order directing the registrar of the Supreme Court of Canada to transmit the record to the registrar of His Majesty's Privy Council, on an appeal by the respondent, without the payment of the fees in stamps as required by the statute and rules of practice of the court. After hearing counsel for the parties, the motion was allowed and the order made as applied for, the Chief Justice stating that, as this was an extraordinary case in which the Judicial Committee of the Privy Council had granted special leave to appeal in *forma pauperis*, the ordinary rules could not apply. *Dominion Cartridge Co.* v. *McArthur*, 7th October, 1902. *Coutlee's Digest, vis. Appeals to the Supreme Court*, No. 386, pp. 124, 1165.

The Supreme Court, or a judge thereof, has no power to allow an appeal in *forma pauperis*, or to dispense with the giving of the security required by the statute. Approving of the security is a mode of allowing leave to appeal. Section 24, Supreme and Exchequer Courts Act, does not give the court power to allow leave to appeal, because Her Majesty may be recommended to do so by the Judicial Committee of the Privy Council, nor is it in the power of the judges of the court to make rules or orders for the allowance of leave to appeal; nor does sec. 79, Supreme and Exchequer Courts Act, give the court or a judge any power to grant or to make rules

for granting the prayer of a petition to be allowed to have or prosecute an appeal in *forma pauperis*. Fournier, J., in Chambers; Richards, C. J., in Chambers. *Fraser* v. *Abbott, Cass. Dig.* (2nd ed), 695; *Cass. S. C. Prac.* (2nd ed.), 63, 68. *Coutlee's Digest, vis. Appeals to the Supreme Court,* No. 314, L. 111.

Reimbursement of costs.—A judgment of the Supreme Court of Canada allowing an appeal with costs (20 Can. S. C. R., 481), was carried, in further appeal, by the respondents to Her Majesty's Privy Council, where the decision was reversed. (1893, A. C., 506; 63 L. J., 14). The respondents had, however, in the meantime paid the costs under the order of the Supreme Court. On motion in the Supreme Court of Canada, on behalf of the said respondents, it was held that they were entitled to an order directing the repayment to them of the costs so paid, the amount of such costs to be settled upon an inquiry before the Registrar of the Supreme Court of Canada. Motion granted with costs. *Duggan* v. *London and Canadian Loan & Agency Co., 23rd March, 1893. Coutlee's Digest, vis. Practice of the Supreme Court of Canada,* No. 67, p. 1108.

Stay of Proceedings.—Where the respondent has taken an appeal, from the same judgment as is complained of in the appeal to the Supreme Court of Canada, to the Judicial Committee of Her Majesty's Privy Council, the hearing of the appeal to the Supreme Court will be stayed until the Privy Council appeal has been decided, upon the respondent undertaking to proceed with diligence in the appeal so taken by him. In the case in question the costs were ordered to be costs in the cause. *Eddy* v. *Eddy, 4th October, 1893. Coutlee's Digest, vis. Appeals to the Supreme Court,* No. 423; p. 130, 1164.

When an appeal had been inscribed for hearing in the Supreme Court of Canada after notice of an appeal in the same matter by the respondent to the Privy Council, upon motion on behalf of the respondent, the proceedings in the Supreme Court were stayed with costs against the appellant pending the decision of the Privy Council upon the respondent's appeal, following *Bank of Montreal* v. *Demers,* XXIX, 435, *Eddy* v. *Eddy. Coutlee's Digest, vis. Appeals to the Supreme Court,* No. 423, p. 131.

At the hearing of the appeal it appeared that the respondent had taken an appeal from the same judgment to Her Majesty's Privy Council, and that the respondent's said appeal was then pending before the Judicial Committee of the Privy Council. The court, in consequence, stopped the arguments of counsel, and ordered that the hearing of the appeal to the Supreme Court of Canada should stand over until after the adjudication of the said appeal to the

Privy Council. *McGreevy* v. *McDougall, 3rd March, 1888. Coutlee's Digest, vis. Appeals to the Supreme Court,* No. 121, p. 74.

A judge in Chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the Court to the Judicial Committee of the Privy Council.

GIROUARD, J., page 223:—"I find that according to the uniform practice of this court, it is not possible to grant this application. Since the argument upon the motion, I have had an opportunity of consulting with my brother judges as to the question of practice, and they all agree that this court has always refused to entertain applications of this nature. Motion refused with costs."

Canada Sup. C., 1901, *Burns* v. *The Bank of Montreal, et al.,* 31 Sup. C. B., 223.

Settlement of minutes of judgment:—A motion was made before the court to vary the minutes as settled by the registrar by reciting special features as to the proceedings (*see* 31 *Can. S. C. R.,* 246-247), for the purposes of a proposed appeal to the Privy Council. The Chief Justice took no part, but the remainder of the Court MM. Justices Taschereau, Gwynne, Sedgwick and Girouard were of the opinion that the applicant should take nothing by his motion and refused to interfere with the minutes as settled, stating, however, that the registrar should grant a certificate to the applicant showing the nature of the proceedings had for the purpose of being used upon the appeal to the Privy Council. *Consumers' Cordage Co.* v. *Connolly, 7th May, 1901. Coutlee's Digest, vis. Privy Council,* 2204, p. 1165.

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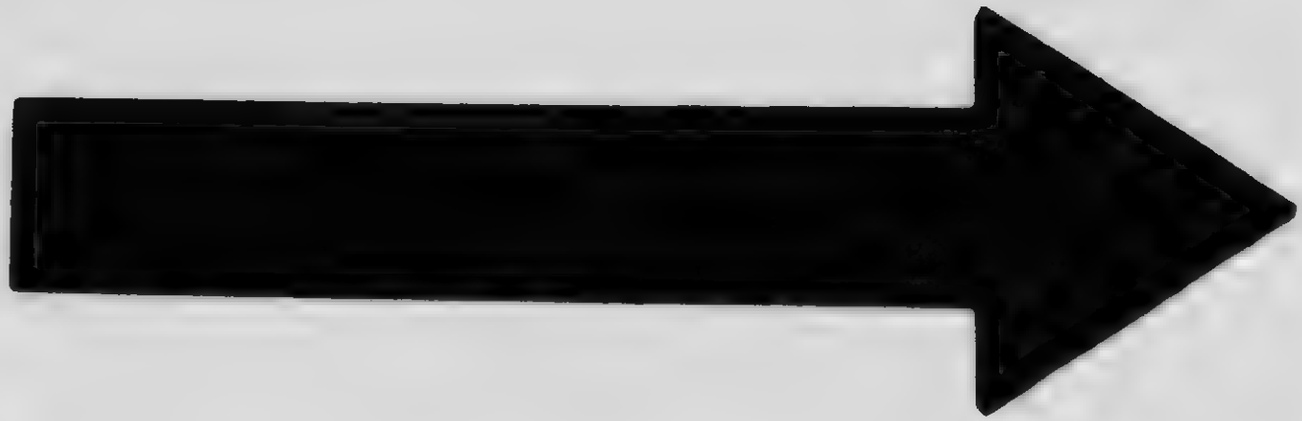

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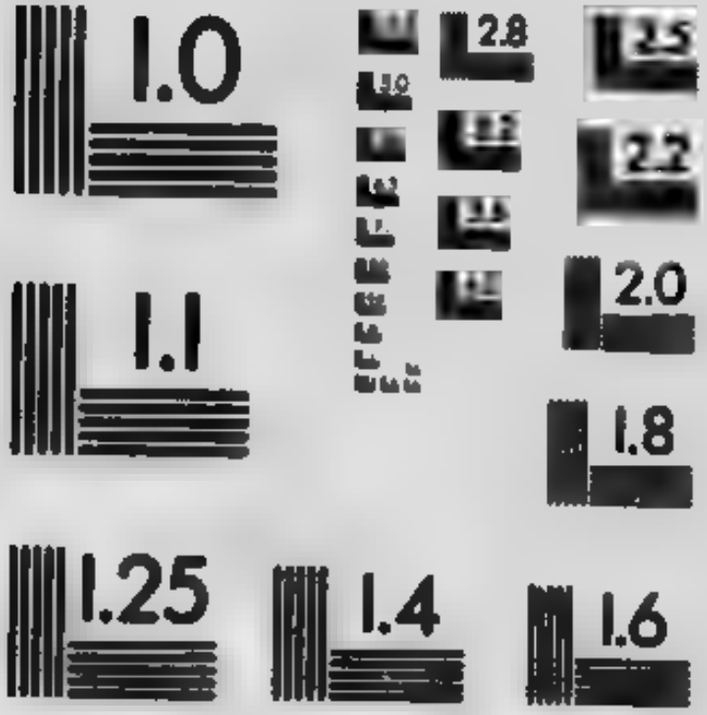

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